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Interaction between Bilateral Investment Treaties and EU Law

Vztah bilaterálních investičních dohod a práva EU

Diplomová práce

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Prohlašuji, že jsem předkládanou diplomovou práci vypracovala samostatně za použití zdrojů a literatury v ní uvedených.

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1. INTRODUCTION

In July 2010 the Commission published a communication titled *"Towards a Comprehensive European International Investment Policy"* expressing its vision of a common investment policy with the ultimate goal of replacing the network of bilateral investment treaties (the "BITs") concluded between Member States and third countries by a regulation based on measures (legislation as well as international treaties) taken primarily by the European Union (the "EU"). It shall be noted that regulation of foreign investments is traditionally seen as a prerogative of sovereign states.

The present thesis reflects current discussions over whether EU law provides for a regulation of foreign investments comparable to the regulation covered by the current BITs concluded by Member States.

For this purpose, the thesis concentrates on identifying the differences between the regulation of foreign investment provided for by EU law and the one secured by the mentioned BITs.

First, in Chapter 2.2 the competence of the EU within the field of foreign investment is analysed. The analysis focuses primarily on the post-Lisbon regulation as well as its implications for future international investment agreements concluded by the EU as part of the common investment policy (the "future EU IIAs").

The core substantive part is dedicated to individual elements of foreign investment law and how they are covered by each regulatory system (i.e. EU law and BITs). Chapter 2.3 explores the scope of both EU law and BITs regulation by determining what is covered by the notion of investment under each system. Chapter 2.4 discusses the promotion and admission of foreign investments. Chapter 2.5 focuses on the standards of treatment. Chapter 2.6 concentrates on the subject of expropriation. Finally, Chapter 2.7 analyses the means of dispute settlement available to investors under the different regulatory systems.

The chapters are further divided to reflect separately on the regulation provided by BITs and the regulation ensuing from EU law, referring from time to time to regulation contained in EU IIAs concluded by the EU prior to the entry into

force of the Lisbon Treaty as regulation provided therein might be indicative of future content of EU IIAs concluded within the common investment policy.

The individual chapters (EU Competence, Defining Investment and Investor, Admission and Promotion, Standards of Treatment and Protection, Expropriation and Dispute Settlement) are summarized by concluding notes on the subject at the end of respective chapters identifying the conclusions reached with regard to the differences in the regulation offered by EU law and BITs and their implications for the common investment policy and future EU IIAs.

The analysis provided herein is by no means exhaustive.

2. INTERACTION BETWEEN BITS AND EU LAW

2.1 Current State of Affairs

In July 2010 the Commission published the Communication *"Towards a Comprehensive European International Investment Policy"*[1] presenting its vision of a common international investment policy, which is to transfer the regulation of foreign investment, traditionally considered to be the domain of sovereign states, from Member States to the EU.

The ground form the common EU investment policy was paved by the Lisbon Treaty[2], which, by its entry into force on December 1 2009, vested the EU with an exclusive competence to regulate foreign direct investments as part of its common commercial policy[3] pursued towards third countries, meaning that Member States will no longer be competent to legislate, conclude international treaties or take any other measures on the subject of foreign direct investments except for when provided so in the EU legislation[4].

Although the competence of the EU within the field of foreign investment was limited prior to the entry into force of the Lisbon Treaty, the EU had already taken measures that headed "*towards a broad and proactive approach on the issues"*[5]. In its endeavours it was heavily supported by the ECJ and its jurisprudence on implied powers and had already *inter alia* concluded a number of international treaties affecting foreign investment (hereinafter referred to as "EU IIAs", i.e. Investment

[1] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions *"Towards a comprehensive European international investment policy"*, COM(2010)343.
[2] *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 13 December 2007, 2007/C 306/01.
[3] See also BUNGENBERG, M., *The Division of Competences Between the EU and Its Member States in the Area of Investment Politics.* In HINDELANG, S., BUGENBERG, M., GRIEBEL, J. (Eds.), *European Yearbook of International Economic Law. Special Issue: International Investment Law and EU Law.* London: Springer, 2011, p. 29-43:*"... the Lisbon Treaty, at least in the area of the CCP, constitutes a benchmark and a shift of paradigms. Of all changes brought about by the Lisbon Treaty, the ones regarding the CCP seem to bet he largest but sill the least discussed ones."*
[4] See Article 207 (6) TFEU.
[5] BUNGENBERG, M., *The Division of Competences Between the EU and Its Member States in the Area of Investment Politics.* In HINDELANG, S., BUGENBERG, M., GRIEBEL, J. (Eds.), *European Yearbook of International Economic Law. Special Issue: International Investment Law and EU Law.* London: Springer, 2011, p. 29-43.

International Agreements concluded by the EU) and enacted rules relating to foreign investment policy.

At the same time, however, an intricate network of bilateral investment treaties was being developed by Member States. Thus, two competing regimes regulating foreign investments have existed simultaneously.

The importance of the topic is widely acknowledged for a number of reasons. First, from the practical point of view the common commercial policy is still the most important field of the EU external policy.[6] Second, the EU is an important global player and concludes numerous agreements (be it bilateral or international) with its strategic partners, which directly affect foreign investments.[7] Third, the changes brought about by the Lisbon Treaty affect significantly the distribution of powers between the EU and its Member States. Fourth, there are ensuing legislation proposal calling fall the common investment policy.[8]

Currently, discussion is being held over the scope of the EU regulation over foreign investments and whether it actually has the potential to replace the regulation provided by BITs in full. Especially the competence of the EU to cover certain crucial aspects of foreign investment protection, such as expropriation or investor-state arbitrations, raise doubts. Some suggest, addressing the limits of the newly gained competence, that the Lisbon Treaty and its provisions relating to foreign direct investment are just *"half way toward a common investment policy"*[9].

The present thesis will therefore further analyse the question in an attempt to draw conclusions on the actual (dis)similarity between the regulation provided by the EU and the regulation accorded by BITs.

[6] See also DIMOPOULOS, A., *The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy*. In *European foreign affairs review*, 2010, No. 15, p. 153-170.
[7] See also BUNGENBERG, M., *Going global? The EU Common Commercial Policy After Lisbon*. HEMRANN, C., TERHECHTE, J.P. (Eds.), *European Yearbook of International Economic Law*. London: Springer, 2010, p. 123-153.
[8] KRAJEWSKI, M., *The Reform of the Common Commercial Policy*. In BIONDI, A., EECKHOUT, P., *European Union Law after the Treaty of Lisbon*. Oxford: Oxford University Press, 2011.
[9] SHAN, W., ZHANG, S.: The Treaty of Lisbon: Half Way toward a Common Investment Policy. In *The Euroepan Journal of International Law*, Vol. 22, no. 4, 2011, p. 1049.

2.2 EU competence

"The nature and scope of the Community's (now Union's) competence with regard to the common commercial policy has been a "constitutional construction site" of growing complexity since the early days of the European Economic Community. The Treaty of Lisbon clarifies some of the pertinent and disputed issues, but also raises new questions."[10]

2.2.1 Principle of Conferral

The competence of the EU to act within the field of foreign investment rests, as in any other sphere, on the principle of attributed powers (the principle of conferral) meaning that the EU can only act if there is a relevant legal basis. A competence for which there is no legal basis in the Treaties remains with Member States. This principle is enshrined in Article 5 (2) TFEU stating that "*under the principle of conferral, the 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. Competences not conferred upon the Union in the Treaties remain with the Member States".*

Article 5 TEU[11] applies to both internal and external actions of the EU, i.e. the power to enact internal measures and legislation as well as to adopt external measures and conclude international agreements.[12] In other words, the fact that the EU enjoys internal competence in a certain field does not automatically mean that the EU is

[10] KRAJEWSKI, M., *The Reform of the Common Commercial Policy*. In BIONDI, A., EECKHOUT, P., *European Union Law after the Treaty of Lisbon*. Oxford: Oxford University Press, 2011, p. 298.
[11] Article 5 TEU:
"1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.
2. Under the principle of conferral, the 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. Competences not conferred upon the Union in the Treaties remain with the Member States.
3.Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.
The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.
4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.
The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality."
[12] DIMOPOULOS, A., *EU Foreign Investment Law*. Oxford : Oxford University Press, 2011, p. 67.

entitled to conclude international agreements relating to that particular field of regulation. As analysed below, the external competence occurs either in case of a separate explicit legal basis or in case the conditions of the doctrine of implied powers are met.

2.2.2 Categories of EU Competences

Even in case when a power is conferred on the EU a further analysis (with reference to Articles 2 to 6 TFEU) shall be carried out to identify the nature of a particular competence. Depending on the extent of cooperation with Member States involve a competence falls into one of the three categories of:

a) exclusive competences[13];

b) shared competences[14];

c) supportive, coordinative or supplementary competences[15].

For the purposes of analysis EU competence over foreign investments categories of exclusive and shared competences are of importance.

2.2.3 Exclusive Competence over Direct Investments

The post-Lisbon competence of the EU within the field of foreign investments is primarily based on Article 207 TFEU[16] providing for the EU's exclusive

[13] See Article 2(1) TFEU: *"When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts."* For the list of fields where exclusive competence is practised see Article 3 (1) TFEU. For exclusive competence to conclude international agreement see Articel 3 (2) TFEU.

[14] See Article 2 (2) TFEU: *"When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence."* For the list of principal areas where shared competence ix exercised see Article 4 TFEU.

[15] See Article 2 (5) TFEU: *"In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas."* For the list of areas see Article 6 TFEU.

[16] Article 207 (relevant parts)

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

3. Where agreements with one or more third countries or international organisations need to be negotiated and concluded, Article 218 shall apply, subject to the special provisions of this Article."

competence[17] over the common commercial policy[18], which now explicitly includes foreign direct investment.[19]

As it transpires from the wording of the mentioned Article, the explicit exclusive competence is limited to foreign direct investment[20] thus leaving other, non-direct forms of investment such as portfolio investments, state contracts and concessions, loans or intellectual property rights (which are, generally speaking, covered by BITs) beyond the reach of the mentioned exclusive competence.

It means that *"if the EU only had competence to conclude international agreements on foreign direct investment, it would not be capable of concluding agreements according to the commonly accepted international standard. Indeed, any new agreement concluded by the EU, unless concluded together with the Member States (mixed agreement), could and would necessarily lag behind the level of investment protection afforded by BITs today."*[21]

This would leave the competence of the EU crippled and lagging significantly behind the current BITs regulation, therefore effectively ruling out the replacement of BITs by EU regulation. This seems to be incompatible with, at least, the vision of the Commission, thus more thought has been put into interpretation and potential use of other EU law instruments and relevant case law and the competence of the EU has been seemingly stretched to cover the scope of BITs regulation, as discussed below.

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[17] See also Article 3 (1) (e) TFEU explicitly holding that the EU shall have exclusive competence over the common commercial policy, which, in fact, codifies the conclusions of the CJEU reached on the exclusive power of the EU in the matters of common commercial policy. See also CJEU Opinion 1/75 (*Local Costs*).

[18] The common commercial policy covers both measure adopted by the EU institutions and agreements negotiated with third countries at the EU level. See also CRAIG, P., DE BURCA, G., *EU Law: Texts, cases, and Materials*, 4th ed.. Oxford: Oxford University Press, 2008, p. 183. On the evolutionary character of the common commercial policy see DIMOPOULOS, A., *The Common Commercial Policy after Lisbon: Establishing parallelism between internal and external economic relations?* In *Croatian Yearbook of European Law & Policy*, Vol. 4, 2008, p. 102-131.

[19] The common commercial policy comprises an autnomous (i.e. internal EU legislation regulating trade) and international (i.e. conclusion of international agreements) dimesions.

[20] Definition and interpretation of the term „foreign direct ivnestment" is dealt with in chapter 2.3 (*„Defininig Investment and Investor"*).

[21] HINDELANG, S., MAYDELL, N., *The EU's Common Investment Policy – Connecting the Dots*. In HINDELANG, S., BUGENBERG, M., GRIEBEL, J. (Eds.), *European Yearbook of International Economic Law. Special Issue: International Investment Law and EU Law.* London: Springer, 2011, p. 12-13.

The fact that exclusive competence of the EU is, under Article 207 TFEU, limited to foreign direct investment does not automatically mean that the EU has no competence to regulate non-direct forms of investment whatsoever since the EU might well be competent on the basis of other Treaty provisions.[22]

Although expert discussion on the topic has not yet been completed, the opinions expressed suggest that the EU competence to conclude international agreements is extended to cover non-direct forms of investments as well on the basis of the principle of implied external powers, i.e. "*the EU continues to have implied non-exclusive, i.e. shared, competence to conclude international agreements relating not just to foreign direct investment, but also to portfolio investment. Therefore, the EU will be competent, based on its explicit exclusive competence in Art. 207 TFEU for foreign direct investment and its implied shared competence for portfolio investment, to conclude international agreements providing for the standard commonly seen in today's BITs without any Member State's involvement."*[23]

This would result in the fact that *"the Union is exclusively competent concerning those aspects of the agreement which relate to foreign direct investment, the Member States remain competent concerning portfolio investments. The practical consequence is that all investment agreements which cover both aspects need to be concluded as mixed agreements."*[24]

The conclusion stated above appears to be a modest version of the statement made by the Commission in its Communication[25] claiming that the EU has an implied exclusive external competence relating to portfolio investments based on the provisions on the freedom of capital movements.[26]

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[22] See also Article 4 (1) TFEU.

[23] HINDELANG, S., MAYDELL, N., *The EU's Common Investment Policy – Connecting the Dots*. In HINDELANG, S., BUGENBERG, M., GRIEBEL, J. (Eds.), *European Yearbook of International Economic Law. Special Issue: International Investment Law and EU Law.* London: Springer, 2011, p. 13.

[24] KRAJEWSKI, M., *The Reform of the Common Commercial Policy*. In BIONDI, A., EECKHOUT, P., *European Union Law after the Treaty of Lisbon*. Oxford: Oxford University Press, 2011.

[25] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions "Towards a comprehensive European international investment policy", COM(2010)343, p.8.

[26] As a critique of the mentioned statement put it, the statement *"ignores the express intention of the drafters of the Lisbon Treaty to limit the EU's competence to foreign direct investment"*. KRAJEWSKI, M., *The Reform of the Common Commercial Policy*. In BIONDI, A., EECKHOUT, P., *European Union Law after the Treaty of Lisbon*. Oxford: Oxford University Press, 2011. However, it shall be taken into consideration that the views of Krajewski are often rejected as being to restrictive.

2.2.4 Implied Powers

As outlined above, despite the principle of conferral, powers of the EU can be expanded by virtue of the doctrine of implied powers formerly based on the case law according to which the EU possesses not only the powers expressly provided for in the Treaties but also powers implied from explicit Treaty provisions.

In fact, the Commission in its Communication argues that certain internal market provisions (such as rules on capital movements) provide for an implied exclusive competence of the EU in accordance with Article 3(2) TFEU *("The Union shall also have exclusive competence for the conclusion of an international agreement… in so far as its conclusion may affect common rules or alter their scope."* (the relevant part only)) based on the assumption that international agreements on investment affect the internal market rules as governed by provisions on capital movements and thus the EU enjoys exclusive external competence to conclude international agreements affecting capital movements.

This might, however, be a too broad reasoning. Below the relevant case law and Treaty provisions on the doctrine of implied powers are briefly discussed.

2.2.4.1 Case Law on Exclusive Implied Powers

The ECJ has developed a rich case law on the subject of exclusive implied powers. Based on the case law, there are basically four situations in which an exclusive implied power of the EU can arise.

First, the EU has exclusive competence in case when such power is prescribed in secondary legislation, i.e. for instance, in case when secondary internal legislation explicitly states that the EU shall conclude international agreements affecting the treatment of third countries' nationals.[27]

Second, the EU possesses exclusive implied powers when and to the extent that the EU has already created extensive legislation in a certain sphere, i.e. for instance, in the fields where full harmonization occurs. In case of less intensive legislation a test would have to be applied whether an international agreement concluded by a Member States does have the potential to render the internal rules less

[27] CJEU Opinion 1/94 (*WTO*), para. 95.; CJEU Opinion 2/92 (*OECD*), para. 33.

effective – in case it does the competence of the EU would be exclusive so as to prevent potential undermining of the internal rules.[28]

Third, the exclusive competence arises also in case when the legislation does not cover entire field of law (the extent of "largely covered" field would suffice), but there is an expectation that a further legislation would be passed aimed at further harmonization within the field.[29]

Fourth, the EU possesses external exclusive competence if and to the extent that it is necessary to make effective use of the respective internal competence. The mentioned exclusivity is further subjected to two tests: first, the exclusive external competence must cover the same field as the internal one and it shall be used to accomplish objectives of the relevant internal provision. Second, the effective use of the relevant internal competence can be secured neither by the Member States acting in concerted action nor by autonomous national legislation.[30]

2.2.4.2 Case Law Codified under the Lisbon Treaty

With the entry into force of the Lisbon Treaty, the mentioned case law on implied powers was attempted to be codified in Article 3(2) TFEU dealing with the exclusive competence of the EU to conclude international agreements. The mentioned Article states that: "*The Union shall also have exclusive competence for the conclusion of an international agreement when:*

I. its conclusion is provided for in a legislative act of the Union, or

II. is necessary to enable the Union to exercise its internal competence, or

III. in so far as its conclusion may affect common rules or alter their scope."

Article 3 (2) TFEU shall be compared with Article 216(1) TFEU on the EU implied competence to conclude international agreements, which does not specify the nature of the competence, i.e. whether it is exclusive or shared competence. Article 261 (1) TFEU reads as follows: *"The Union may conclude an agreement with one or more third countries or international organisations:*

I. *where the Treaties so provide or*

[28] CJEU Opinion 2/92 (*OECD*).
[29] CJEU Opinion 2/91 (*ILO*).
[30] Opinion 1/76 (*ECR*), para.4; CJEU Opinion 2/92 (*OECD*), para. 33.

II. *where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or*

III. *is provided for in a legally binding Union act or*

IV. *is likely to affect common rules or alter their scope."*

Thus, in order to determine the nature of competence (i.e. whether the competence to conclude international agreements is exclusive or shared) under Article 216 (1) TFEU for each of the individual circumstances provided for therein, the interpretation of Article 216 (1) TFEU shall be made by reference to Article 3 (2) TFEU.

When the mentioned Articles are compared they do not overlap in the competence to conclude *"an agreement necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties"*. Bearing in mind that the question is still not yet settled, it seems that the external competence of the EU is non-exclusive (i.e. shared) only in case of concluding *"an agreement necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties"*.

Depending on a particular form of investment or a particular element of protection intended to be included in future EU IIAs the competence of the EU shall be determined in accordance with the mentioned Articles.[31]

[31] See also C-467/98 *Commission v. Denmark* (*Open Skies*): *"61 The finding in the preceding paragraphs cannot be called into question by the fact that the measures adopted by the Council in relation to the internal market in air transport contain a number of provisions concerning nationals of non-member countries…. Contrary to what the Commission maintains, the relatively limited character of those provisions precludes inferring from them that the realisation of the freedom to provide services in the field of air transport in favour of nationals of the Member States is inextricably linked to the treatment to be accorded in the Community to nationals of non-member countries, or in non-member countries to nationals of the Member States. 62 This case, therefore, does not disclose a situation in which internal competence could effectively be exercised only at the same time as external competence. 63 In the light of the foregoing considerations, it must be found that, at the time when the Kingdom of Denmark concluded the amendments made in 1995 with the United States of America, the Community could not validly claim that there was an exclusive external competence, within the meaning of Opinion 1/76, to conclude an air transport agreement with the United States of America."* See also DIMOPOULOS, A., *The Common Commercial Policy after Lisbon: Establishing parallelism between internal and external economic relations?* In *Croatian Yearbook of European Law & Policy*, Vol. 4, 2008, p.112: *"…in accordance with the doctrine of implied powers, the existence of such implied powers requires that regulation of the activity of third country nationals in the EU as well as of EU nationals in third countries is necessary for the attainment of the objectives of the internal market, which is not always clear. Furthermore, such competence is shared with Member States and exclusivity arises only if the criteria of AETR-type exclusivity are fulfilled. Similar concerns exist with regard to*

In case such competence is a shared competence it shall follow the principles stated in Article 2(2) TFEU: "*When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence."*

It means that both the EU and Member States can take measure in a field covered by shared competence in accordance with the principle of subsidiarity: *This means that it is not necessary for the EU to be joined by the Member States when taking external action in a field of shared competence. Nevertheless, the EU cannot obstruct the Member States from taking autonomous action in the international sphere in the respective field."*[32] And further: *"This leads to a split of the competence to negotiate and conclude investment agreements. The Union is exclusively competent concerning those aspects of the agreement which relate to foreign direct investment, the Member States remain competent concerning portfolio investments. The practical consequence is that all investment agreements which cover both aspects of investment need to be concluded as mixed agreements."*[33]

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It shall be noted that the relevant doctrine inclines to the conclusion that the competence of the EU, as to different forms[34] of investments beyond the explicit competence over direct investments, is shared competence based on the assumption that conclusion of agreements would be necessary *"in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties"* as

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the post-establishment treatment of foreign investors, where again the foundations of EC competence are rather obscure."

[32] DIMOPOULOS, A., *EU Foreign Investment Law*. Oxford : Oxford University Press, 2011, p. 75.

[33] KRAJEWSKI, M., *The Reform of the Common Commercial Policy: coherent and democratic?* In BIONDI, A., EECKHOUT, P., RIPLEY, S. (Eds.), *EU Law after Lisbon*. Oxford: Oxford University Press, 2012, p. 302.

[34] Please note that the discussion over shared competence concerns forms of investments other that explicitly covered direct forms. There is a related discussion over the scope of competence which, however, cocnerns the question of post-entry regulation (i.e. the standards of protection rather that definition of investments covered) to which the conclusions stated above do not apply; this latter issue of the scope of competence is dealt with futher in this chapter under the heading "*Standards of Treatment and Protection*" as well as in the chapters 2.5, 2.6 and 2.7.

is stated in Article 216 (1) TFEU.[35] Exclusive nature of competence over other forms of investments is rejected on the ground that the conditions required under Article 3 (2) TFEU are not met with regard to other forms of investments.

For instance as far as state contracts, concessions (the freedom to provide services), intellectual property rights, portfolio investments as well as other contractual rights (the freedom of capital movements) that might be protected under BITs are concerned the relevant chapters in TFEU do not provide for the competence of the EU to conclude international agreement within their scope of regulation. At the same time it is argued that concluding international agreements is not necessary for the EU to perform its internal competence (since it functions well even nowadays when BITs with third countries are still in force) as well as that the conclusion of agreements within such fields by Member States would not affect common rules or alter their internal scope since they would affect investments from third countries meaning that the internal rules would remain intact.

However, it shall be also noted that advocates of restrictive interpretation of Article 207 (1) TFEU doubt whether even a shared competence occurs in case of forms of investments not provided for explicitly in the mentioned Article. The argument rests on the opinion that such a broad interpretation is far beyond the objective of the common commercial (or rather investment) policy.[36]

2.2.5 Standards of Treatment, Protection

Besides the fact that the term "foreign direct investment" does not cover all forms of foreign investments generally protected by BITs, further uncertainties arise over the scope of protection, which is to be provided under Article 207 TFEU.

Article 207 TFEU itself does not mention any restrictions or limits concerning the scope of protection which shall be provided thereunder.

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[35] See DIMOPOULOS, A., *EU Foreign Investment Law*. Oxford : Oxford University Press, 2011, where individual forms of investments and other related issues are analysed in an attempt to determine the nature of the EU competence over each aspect of foreign investments. The task is beyond the scope of the present thesis as it si limited to general overview of selected elements of foreign investments regulation. The present thesis, therefore, assumes, from time to time, that the conclusions reached on the combination of exclusive and shared competence are correct.

[36] As regards policy objectives, the common commercial policy is subject to both Article 206 TFEU (specific objectives relating to the common commercial policy) and Article 21 TEU (general objectives relating to external policy of the EU). For more on policy objectives see also KRAJEWSKI, M., *The Reform of the Common Commercial Policy: coherent and democratic?* In BIONDI, A., EECKHOUT, P., RIPLEY, S. (Eds.), *EU Law after Lisbon*. Oxford: Oxford University Press, 2012, p. 295.

The debate is rather a discussion over the objectives of the common investment policy as such. Bellow follows a brief overview of the range of protection, which might be covered by the common investment policy and future EU IIAs.

2.2.5.1 Trade-related aspects only

It has been argued, in a very restrictive way, that the scope of the protection for which the competence of the EU is established under Article 207 TFEU encompasses merely investment liberalization.[37] This would basically cover only the internal and external conditions of market access, pre-establishment and national treatment, excluding post-establishment standards of treatment, protection or expropriation. The argument is based on the mainly on the context and purpose of the provision as well as on the history of the negotiations over the TFEU.[38]

The provision establishing the competence over foreign direct investment is part of the common commercial policy, which is generally orientated towards the trade (especially the entry liberalization, eliminating restrictions on market access etc.) and not on subsequent treatment of trade articles.

On the other hand, the face of trade policies is changing as might be suggested by inclusion of trade-in-services, intellectual property rights and foreign direct investment. Even, within the WTO there was an attempt to negotiate multilateral agreement on investment. Further, in case of intellectual property right, the Treaty explicitly states that the competence is confined to their trade-related aspects. No such specification is provided for in case of FDI.[39]

2.2.5.2 Market access only

Relaying on the objectives of the common commercial policy, the competence, it has been argued, shall be restricted to regulation of market access and liberalization but not that of post-entry regulation and protection.[40]

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[37] See, for instance, KRAJEWSKI, M., *External Trade Law and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy?* Common Law Review, 2005, p. 91 et seq.

[38] KRAJEWSKI, M., *External Trade Law and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy?* Common Law Review, 2005, p. 112-114. For counter-arguments see also SHAN, W., ZHANG, S.: The Treaty of Lisbon: Half Way toward a Common Investment Policy. In *The Euroepan Journal of International Law*, Vol. 22, no. 4, 2011, p. 1059 et seq.

[39] SHAN, W., ZHANG, S.: The Treaty of Lisbon: Half Way toward a Common Investment Policy. In *The Euroepan Journal of International Law*, Vol. 22, no. 4, 2011, p. 1060-61.

[40] See LECZYKIEWICZ, D., Common Commercial Policy: The Expanding Competence of the European Union in the Area of International Trade. In *German Law Journal*, 2005, No. 6.

The objectives are stated in Article 206 TFEU: *"By establishing a customs union in accordance with Articles 28 to 32, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers."*[41]

On the contrary, it might be argued that absence of post-entry regulation and protection might put off potential investors. Further, in its Opinion 1/78 the CJEU stated that the common commercial policy goes beyond market liberalization and might cover *"regulation of the world market for certain products"*[42].

2.2.5.3 Limited Regulation

Article 207 (6) TFEU contains so called "parallelism clause". The mentioned Article rules out the competence of the EU which are excluded from the power of the EU by EU legislation itself such as public health, cultural or social services. Therefore, the extent of such an absolute standard would depend on whether the EU is entitled to take such measures internally.[43] Ceyssens argues that since neither protection against expropriation nor fair and equitable standard exist in the internal market they shall not be covered by the competence under Article 207 TFEU.

As far as protection against expropriation is concerned, arguments were proposed based on Article 345 TFEU, which, it is argued, shall be interpreted narrowly so as to cover only the right of Member States to decide freely over whether

[41] For principles and objectives see also KRAJEWSKI, M., *The Reform of the Common Commercial Policy: coherent and democratic?* In BIONDI, A., EECKHOUT, P., RIPLEY, S. (Eds.), *EU Law after Lisbon*. Oxford: Oxford University Press, 2012, p. 294 et seq.: *"The objectives of Article 206 TFEU refer to trade liberalization, but they do not indicate a free trade policy. Instead, the wording indicates that the proces of trade liberalization shall be a gradual one. In this respect the objectives of Article 206 TFEU resemble the objectives of the world trading system. The Tretay of Lisbon did not change the contents of the specific policy objectives of the common commercial policy much (with the exception of the inclusion of investment liberalization), but it modified their addressees and legal nature. While the TEC referred to the Member States as actors, Article 206 TFEU uses the Union as grammatical subject and underlines the predominant role of the Union as an actor in external trade policy. More importantly, Article 206 TFEU turn the gradual trade liberalization into a binding objective."*. See also BUNGENBERG, M., *Going global? The EU Common Commercial Policy After Lisbon*. HEMRANN, C., TERHECHTE, J.P. (Eds.), *European Yearbook of International Economic Law*. London: Springer, 2010, p. 144.

[42] CJEU Opinion 1/78 (*Nature Rubber Agreement*). See also SHAN, W., ZHANG, S.: The Treaty of Lisbon: Half Way toward a Common Investment Policy. In *The Euroepan Journal of International Law*, Vol. 22, no. 4, 2011, p. 1061-2.

[43] DIMOPOULOS, A., *Creating an EU Investment Policy: Challenges for the Post-Lisbon Era of External Relations*. In CARDWELL, P.J. (Ed.), *EU External Relations Law and Policy in the Post-Lisbon Era*. The Hague: Springer, 2012, p. 408.

to nationalize or privatize certain assets and does not, therefore, retain any exclusive rights of Member States to determine expropriation[44], or in other words, *"it is strongly argued that Article 345 TFEU should be narrowly construed, which, together with the broad pronouncement of FDI competence under Article 207 TFEU indicates that Article 207 TFEU covers also protection of FDI against expropriation."*[45] Expropriation measures have already been dealt with in the CJEU case law and are covered by Article 17 of the Charter on Fundamental Freedoms.

2.2.5.4 Full regulation and Protection

Arguments have been raised in favour of a more generous competence so as to enable the EU to conclude agreements resembling US free-trade agreements. It would include market access, both pre- and post-establishment standards of treatment and protection, protection against expropriation and even a mechanism for investor-state dispute-settlement.

There are no explicit restrictions placed on the scope of protection included in Article 207 TFEU. Thus, it might be argued, that *"for reasons of efficiency and practicability (effet utile) the EU should possess the competence for all possible aspects of (foreign direct) investment promotion and protection"*[46].

Finally, despite the willingness of the EU to provide for the investor-state arbitration in future EU IIAs, based on the argument that the EU possesses legal personality and thus is entitled to conclude an agreement conferring dispute-settlement relating to its investment disputes to a forum of its choice), it is argued that such measure might breach the limits set out in the ECJ's opinions[47] on the relation between dispute settlement and the autonomy of EU law and the corresponding jurisdiction of the ECJ.[48]

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[44] BUNGENBERG, M., *Going global? The EU Common Commercial Policy After Lisbon*. HEMRANN, C., TERHECHTE, J.P. (Eds.), *European Yearbook of International Economic Law*. London: Springer, 2010, p. 144.

[45] DIMOPOULOS, A., *Creating an EU Investment Policy: Challenges for the Post-Lisbon Era of External Relations*. In CARDWELL, P.J. (Ed.), *EU External Relations Law and Policy in the Post-Lisbon Era*. The Hague: Springer, 2012, p. 408. See also the chapter 2.6 ("*Expropriation*").

[46] BUNGENBERG, M., *Going global? The EU Common Commercial Policy After Lisbon*. HEMRANN, C., TERHECHTE, J.P. (Eds.), *European Yearbook of International Economic Law*. London: Springer, 2010, p. 144.

[47] CJEU Opinion 1/91, CJEU Opinion 1/00, CJEU Opinion 1/09.

[48] DIMOPOULOS, A., *Creating an EU Investment Policy: Challenges for the Post-Lisbon Era of External Relations*. In CARDWELL, P.J. (Ed.), *EU External Relations Law and Policy in the Post-Lisbon Era*. The Hague: Springer, 2012, p. 409.

It shall be noted that the exclusive competence referred to in Article 207 TFEU focuses on extra-EU investment, i.e. investments originating in third countries. There is, however, abundant EU regulation covering intra-EU investments to which different set of rules shall be applied. Since intra-EU investments concern situation within the EU, the internal market rules shall be applied to such investments.

In spite of not directly affecting third countries' foreign investments, attention shall be paid to the internal market rules affecting intra-EU foreign investments since in most cases EU IIAs follow the terminology and system devised by the internal market rules, namely the provisions on regulating the freedom of capital movements, freedom of establishment and freedom of services. Furthermore, the mentioned rules represent, to a great extent, the regulation of intra-EU investments[49].

2.2.6 Competence under Internal Market Rules

2.2.6.1 Freedom of Capital Movements

The admission of foreign investments is regulated by the freedom of capital movements and the freedom of establishment. The competence of the EU to regulate capital movements[50] is determined under Article 63 TFEU, which states that: "*Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited."* And refers to any transfer of capital from one Member State to another.

The freedom of capital movements as stated above is limited by Article 65 (1) and (2) TFEU: "*(1) The provisions of Article 63 shall be without prejudice to the right of Member States: (a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested; (b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial*

[49] Provisions on the freedom of capital movements (Article 64 TFEU et seq.) in fact cover the initial entry stage of an investment, and provisions on the freedom of establishment (Article 49 TFEU et seq.) and freedom of services (Article 56 TFEU et seq.) the post-establishment stage. See also BELOHLÁVEK, A.J., *Ochrana přímých zahraničních investic v Evropské unii.* Praha: C.H. Beck, 2010, p. 38, supra. 48.

[50] For the scope of the provisions on capital movements see the Annex to the Capital *Directive 88/361/EEC for the implementation of Article 67 of the Treaty* (expired now), which comprised nomenclature and categorization of capital movements.

institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security. (2) The provisions of this Chapter shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with the Treaties."

It is especially Article 63(1) TFEU on capital movements which rises uncertainties: *"Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited."* The question stands: *"If Art. 63(1) TFEU (ex-Art. 56 (1) EC) is read as a mere programmatic statement which endeavours to achieve the objective of free movement of capital between the Member States and third countries, the opening up of the EU market to third countries must then be essentially achieved by means of secondary (autonomous) legislation and the conclusion of international treaties, which emblematize the notion of reciprocity. If, however, the scope of Art. 63(1) TFEU (ex-Art. 56 (1) EC) goes beyond a mere programmatic statement and the freedom transfers subjective rights to a third-country investor similar to those of an intra-EU investor, then the EU would have committed itself not to interfere with – neither to discriminate nor to hinder – the access and operation of investments originating from third countries… In this case the EU market would have "automatically" been liberalized unilaterally towards third countries and a CIP (i.e. the common investment policy) would basically be limited to secure market access and favourable treatment standards for EU investments in third countries."*[51] The conclusions of the legal literature on the subject remain divided.

Nevertheless, measures adopted by the EU in pursuit of the policy on capital movements shall be without prejudice to restrictions imposed by Member States within the limits of Article 64[52] and Article 65[53] TFEU (provided such measures are not arbitrary).

[51] HINDELANG, S., MAYDELL, N., *The EU's Common Investment Policy – Connecting the Dots*. In HINDELANG, S., BUGENBERG, M., GRIEBEL, J. (Eds.), *European Yearbook of International Economic Law. Special Issue: International Investment Law and EU Law.* London: Springer, 2011, p. 2-3.

[52] Article 64 (1) TFEU: "*(1) The provisions of Article 63 shall be without prejudice to the application to third countries of any restrictions which exist on 31 December 1993 under national or Union law adopted in respect of the movement of capital to or from third countries involving direct investment — including in real estate — establishment, the provision of financial services or the admission of*

2.2.6.2 Freedom of Establishment

The provisions on freedom of establishment found in Title IV Chapter 2 TFEU provide legal basis for the competence of the EU to regulate both primary and secondary establishment, i.e. setting up and managing new undertaking within the territory of another Member State as well as the setting up of dependant undertakings such as agencies, branches or subsidiaries. The ECJ case law has further refined the notion of the right of establishment to include also the acquisition of existing undertakings as well as cross-border mergers.[54]

The competence to regulate the freedom of establishment is described under Article 49 TFEU: "*Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital."* Generally speaking the freedom of establishment covers foreign investments between Member States in the form of taking part in an undertaking and is aimed at restricting any prohibitions to the freedom of establishment between Member States. The competence of the EU is limited by Article 52 TFEU: *"The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special*

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securities to capital markets. In respect of restrictions existing under national law in Bulgaria, Estonia and Hungary, the relevant date shall be 31 December 1999."

[53] Article 65 TFEU (relevant parts): "*The provisions of Article 63 shall be without prejudice to the right of Member States: (a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested; (b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security."*

[54] See C-208/00 (*Uberseering*), para.77; C-411/03 (*Sevic systems*), para. 19.

treatment for foreign nationals on grounds of public policy, public security or public health."

The scope of the provisions on establishment is, however, different from that of capital movements *inter alia* in that it does not extend to include nationals of third countries. The competence to regulate right to establishment is restricted to the EU nationals as defined in Article 20 TFEU and Article 54 TFEU.

Nevertheless, national laws of Member States shall not be prejudiced by measures taken by the EU in the pursuit of the freedom of establishment provided such laws, regulation or administrative action is taken on grounds of public policy, public security or public health (Article 52 TFEU).

The scope of the EU competence (especially with regard to Article 207 TFEU) is blurred by the delineation between the two freedoms, i.e. the freedom of capital movements and the freedom of establishment, since the first (arguably) applies to nationals of third countries whereas the latter does not. Even in this question the ECJ jurisprudence provides no firm guidelines. The relevant judgments either do not review the question of delineation because the question was not dealt with primarily in relevant cases or because the parties have not referred to the freedoms or they assume that both freedoms are applied in parallel.[55] *"In more recent decisions, however, the ECJ shifted towards a "centre of gravity" priority to the freedom of establishment over the free movement of capital."*[56] The criteria of "centre of gravity" principle giving prevalence, under certain conditions, to the freedom of establishment are, however, not clearly defined. The arguments pursued arguments of the ECJ included the demarcation of the freedoms on the basis on national legislation, i.e. in case the relevant national measure applied only to persons exercising definite influence over an undertaking the freedom of establishment applies. On the other hand, if no ownership interest ration is employed by national legislation both

[55] HINDELANG, S., MAYDELL, N., *The EU's Common Investment Policy – Connecting the Dots*. In HINDELANG, S., BUGENBERG, M., GRIEBEL, J. (Eds.), *European Yearbook of International Economic Law. Special Issue: International Investment Law and EU Law.* London: Springer, 2011, p. 3-4.

[56] HINDELANG, S., MAYDELL, N., *The EU's Common Investment Policy – Connecting the Dots*. In HINDELANG, S., BUGENBERG, M., GRIEBEL, J. (Eds.), *European Yearbook of International Economic Law. Special Issue: International Investment Law and EU Law.* London: Springer, 2011, p. 4.

freedoms apply.[57] However, in a number of cases the ECJ did not consider the application of the freedoms on the basis of national legislation but rather on the extent of influence that an investor exercises over the undertaking.[58]

As Hindelang and Maydell conclude: *"Although this is without any significance in terms of protection granted to a market participant in an intra-EU context, in a third-country context, the scope of protection potentially offered by the TFEU is nullified."*[59]

2.2.6.3 Freedom of to Provide Services

The relation between the freedom to provide services and foreign investments is given with regard to state contracts and concessions, which are generally covered by BITs.

The legal basis establishing the competence of the EU is provided for in Chapter 3 TFEU. Article 57 TFEU defines the term "services" in the following manner: *"Services shall be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons."* followed by an illustrative list of activities included within the meaning. In accordance with Article 58 the freedom to provide services in transport sector and in banking and insurance services is exempt from the Chapter 3 (the exempt services are, however, still covered by shared competence in accordance with Article 4 (2) TFEU).

The broad definition of "services" might well encompass investor-state contracts, which are covered by BITs.

In accordance with Article 62 TFEU Articles 51 to 54 TFEU shall applied to provision of services, meaning that the measure taken within the field of freedom of

[57] Case C-446/04, para. 36 et seq.; Case C-524/04, para. 27 et seq.; Case C-492/04, para. 19 et seq.; Case C-157/05, para. 23; Case C-182/08, para 40, 47 et seq. (as cited in HINDELANG, S., MAYDELL, N., *The EU's Common Investment Policy – Connecting the Dots*. In HINDELANG, S., BUGENBERG, M., GRIEBEL, J. (Eds.), *European Yearbook of International Economic Law. Special Issue: International Investment Law and EU Law*. London: Springer, 2011, p. 4.)

[58] Case C-284/06, para. 68-73; Case C-311/08, para. 23-36; Case C-531/06, para. 40-42; Joined Cases C-439/07 and C-499/07, paras. 68-73.

[59] HINDELANG, S., MAYDELL, N., *The EU's Common Investment Policy – Connecting the Dots*. In HINDELANG, S., BUGENBERG, M., GRIEBEL, J. (Eds.), *European Yearbook of International Economic Law. Special Issue: International Investment Law and EU Law.* London: Springer, 2011, p. 4.

provision of services shall not prejudice the applicability of national law, regulation or administrative actions on grounds of public policy, public security or public health (Article 52 TFEU).

2.2.7 Concluding Notes

First, exclusive competence of the EU over foreign direct investments is established under Article 207 (1) TFEU.

Second, it is not clear whether a competence of the EU to regulate other forms of investments is given. In case such competence exists it is to be a shared competence.

Third, it is not clear what scope of, if any, of post-establishment regulation and protection is given under Article 207 (1) TFEU.

Fourth, the scope of protection of foreign (direct) investments is not yet settled. However, depending on arguments pursued the actually scope of protection ranges from mere market access and liberalization through regulation except for absolute standards and expropriation to comprehensive regulation covering all aspects of foreign investment regulation regularly covered by BITs.

2.3 Defining Investment and Investor

2.3.1 BITs

Whether a transfer of funds constitutes an investment to which protection is granted under the relevant BIT is primarily determined on the basis of definition of foreign investment provided for in the relevant BIT.

A similar definition of investment appears in most of BITs. In most cases[60] there is a general definition of investment supported by a list of forms, which a particular foreign investment might eventually take.

General definition which occurs in most BITs provides that: *the term "investment" shall comprise every/any kind of asset invested in connection with economic activities by an investor of one Contracting Party in the territory of the other Contracting Party*. (emphasis added)

In most cases BITs provide for an illustrative list of forms of FDI which might include:

a) movable and immovable property as well as any other property rights, such as mortgages, pledges or any other kind of liens, ie. property rights to tangible assets as well as other rights to property, which are not full property rights;

b) shares, stocks and bonds of companies or any other form of participation or interest in a company – i.e. various forms of interest in an enterprise[61] , loans[62], debt swaps[63];

c) claims to money or any other claim under contract having an economic value associated with an investment – i.e. certain contractual rights[64];

[60] For examples of investment definitions found in other treaties see also POLLAN, T., *Legal Framework for the Admission of FDI.* The Hague: Eleven International Publishing, 2006, p. 40-42.
[61] POLLAN, T., *Legal Framework for the Admission of FDI.* The Hague: Eleven International Publishing, 2006, p. 32.
[62] See also *Fedax N.V. and The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997; *ČSOB v Slovakia*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999.
[63] See also POLLAN, T., *Legal Framework for the Admission of FDI.* The Hague: Eleven International Publishing, 2006, p. 32.
[64] For the freedom of parties to define a contractual right as an investment as well as for the conditions to be fulfilled for a contractual right in order to be regarded as an investment see POLLAN, T., *Legal Framework for the Admission of FDI.* The Hague: Eleven International Publishing, 2006, p. 34-35.

d) copyrights, trade marks, patents or other intellectual property rights, know-how, trade secrets, goodwill and technical processes associated with an investment – i.e. the intellectual property rights;

e) any right conferred by laws or under contract and any licenses and permits pursuant to laws, including the concessions to search for, extract, cultivate or exploit natural resources – i.e. licences and concessions obtained by an investor from the host state.

Since the mentioned list is not exhaustive and since the general definition covers literally any kind of asset, further criteria have been developed in the relevant case law (especially the jurisprudence of the ICSID) to further refine the notion of foreign investment. There is, however, an on-going expert discussion as to whether such criteria should be considered to amount to a definition of foreign investment (in which case the failure to satisfy any of the criteria would result in the denial of existence of foreign investment) or whether such criteria should be considered to be merely guidelines helping to identifying a potential foreign investment.[65]

One of the most frequently used set of criteria was first identified by the tribunal in the case *Salini v. Morocco*[66] and comprised the following criteria:

1) *a contribution of money or other assets of economic value* – shall be interpreted broadly to encompass both tangible and intangible assets; usually will comprise a complex set of different economic values (monetary, in kind, work force); [67] as far as pre-investment and

[65] Gaillard, J., Identify or Define? Reflections on the Evolution of the Concept of Investment In ICSID Practice. In BINDER, C. (Ed.), *International investment law for the 21st century : essays in honour of Christoph Schreuer*. Oxford: Oxford University Press, 2009, p. 407-411 *("The first method is one of defining, which entails determining in the abstract the factors that are of the essence to an investment in order to then proceed in each case to a process of characterization. This process follows the classic methodology associating one or several constitutive elements with a legal consequence and can be described as deductive. The second method is intuitive. Avoiding all generalizations, it merely identifies features or "characteristics" that have already been observed in scholarly writings or in prior arbitral decisions that have accepted the existence of an investment.")*

[66] *Salini Construttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16 July 2001, para. 52. On how the criteria were applied see also paras. 53-57.

[67] In Salini v. Morocco with regard to contribution made the tribunal held that: *„The contributions made by the Italian companies are set out and assessed in their written submissions. It is not disputed that they used their know-how, that they provided the necessary equipment and qualified personnel for the accomplishment of the works, that they set up the production tool on the building site, that they obtained loans enabling them to finance the purchases necessary to carry out the works and to pay the salaries of the workforce, and finally that they agreed to the issuing of bank guarantees, in the form of a provisional guarantee fixed at 1.5% of the total sum of the tender, then, at the end of the tender*

development expenditures are concerned the case law is not uniform as to whether such expenditures shall be given protection[68]; contribution shall be made within a commercial activity[69]; claims ensuing from investments are protected as well (provided that the underlying dispute arose out of an investment)[70];

2) *a certain duration* – under most BITs short-term transfers of funds with no intention of establishing a long-term link with the host state (*"volatile capital"*[71]) are not granted protection (it might be argued that such investments are not worth the protection since due to their short-time nature they do not contribute to development of the host state); a duration of 2-5 years is generally accepted by the doctrine; the expected duration is usually determined by the relevant investment contract; a prolongation or extended warranty shall count as duration[72]; an expectation of certain duration is sufficient (i.e. the condition of duration might be satisfied even if an investment project fails right at the beginning)[73];

3) *an element of risk* – the risk taken shall be higher than in ordinary commercial contracts;[74] risk is usually implied by long-term nature of

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process, in the form of a definite guarantee fixed at 3% of the value of the contract in dispute. The Italian companies, therefore, made contributions in money, in kind, and in industry."

[68] *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002, para. 59. Compare with *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March, 2011; *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, para. 99-101

[69] *Franz Sedelmayer v. Russia Federation*, Arbitration Award, 7 July 1998, para. 242, 436

[70] *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador*, UNCITRAL, Interim Award, 1 December 2008 (NAFTA Case). Compare with *Romak S.A. v. Republic of Uzbekistan*, Award, 26 November 2009

[71] *Fedax N.V. and The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, para. 43

[72] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, para 133; *Consortium Groupement L.E.S.I. - DIPENTA v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/8, Award, 10 January 2005 (French), para. 14.

[73] SCHREUER, C.H., et al., *The ICSID Convention: A Commentary*. Cmabridge: Cambridge University Press, 2011, p.140, para. 122.

[74] *Salini Construttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16 July 2001, para. 52. On how the criteria were applied see also paras. 55, 56: *"The Claimants, in their reply memorial on jurisdiction, gave an exhaustive list of the risks taken in the performance of the said contract. Notably, among others, the risk associated with the prerogatives of the Owner permitting him to prematurely put an end to the contract, to impose variations within certain limits without changing the manner of fixing prices; the risk consisting of the potential increase in the cost of labour in case of modification of Moroccan law; any accident or*

obligations undertaken; a threat of contract termination is not by itself risk high enough to constitute investment[75]; a payment in advance or a guaranteed minimum price for service/goods delivered etc. does not automatically mean that there is no risk present[76];

4) *a contribution to the host State's development* – covered, for instance, by investor providing public services or acting in public interest or upon concession[77]; shall be interpreted broadly (even an extension of credit might be considered a contribution to the host state)[78];

The test was further (though the criteria are not undisputed) expanded to include the criteria of:

5) *certain regularity of profit and return;*[79]

6) *assets being invested in accordance with the laws of the host State* – protection is not granted to investments established in breach with national legislation of host states (including acting fraudulently)[80]*;* minor mistakes in registration process are not relevant[81] [82]

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damage caused to property during the performance of the works; those risks relating to problems of co-ordination possibly arising from the simultaneous performance of other projects; any unforeseeable incident that could not be considered as force majeure and which, therefore, would not give rise to a right to compensation; and finally those risks related to the absence of any compensation in case of increase or decrease in volume of the work load not exceeding 20% of the total contract price. / It does not matter in this respect that these risks were freely taken. It also does not matter that the remuneration of the Contractor was not linked to the exploitation of the completed work. A construction that stretches out over many years, for which the total cost cannot be established with certainty in advance, creates an obvious risk for the Contractor."

[75] *Toto Construzioni Generali S.p.A. v. the Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009, para. 79; *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para. 109.

[76] *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009.

[77] *Salini Construttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16 July 2001, para. 53 et seq.

[78] *ČSOB v Slovakia*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999; *Fedax N.V. and The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, para. 57.

[79] *Fedax N.V. and The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, para. 43. This criterion is applied when distinguishing between ordinary commercial contracts (which are not protected by BITs) in which case there is usually a single payment for goods provided or services supplied as opposed to investments in which case there is an expectation of a regular payments to be received over a longer period of time.

[80] *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006.

[81] *Tokios Tokelės v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, para. 83-86.

[82] *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, para. 114; *Franz Sedelmayer v. Russia Federation*, Arbitration Award, 7 July 1998, para. 244-253, 275-6, 338,

7) *assets being invested bona fide* – based on an assumption that it cannot be reasonably expected that host states will provide protection to investments not made in bona fide; the criterion was first employed in *Phoenix Action v. Czech Republic* (2009)[83];

Although not explicitly mentioned in most BITs the term "direct investment" shall be discussed, as the meaning of foreign direct investment is crucial for determination of the exclusive competence of the EU.

In general, "direct investment" is considered to involve a participation in an undertaking. In most cases, however, BITs do not specifically mention the term "direct investment". The participation in an undertaking is usually covered as protection of holding of shares or other forms of interest in an undertaking. However, holding of shares in an undertaking can be classifies as both direct and portfolio investment. The differentiating quality necessary to constitute an investment under BITs is a presence of lasting link between investors and an undertaking located in the host state and a certain level of managerial control over such undertaking. [84]

Benchmark OECD definition of "direct investment", which is used as guidelines for statistical purposes, states that: *"Foreign direct investment reflects the objective of establishing a lasting interest by a resident enterprise in one economy (direct investor) in an enterprise (direct investment enterprise) that is resident in an economy other than that of the direct investor. The lasting interest implies the existence of a long-term relationship between the direct investor and the direct investment enterprise and a significant degree of influence on the management of the enterprise. The direct or indirect ownership of 10% or more of the voting power of an*

411; *SwemBalt AB, Sweden v. Republic of Latvia*, UNCITRAL, Decision by the Court of Arbitration, 23 October 2000, para. 35; *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, para. 238, 246-52; *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, para. 334, 339-345; *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, para. 182; *Alasdair Ross Anderson et al v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010, para. 52-3, 57-58; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, para. 319.

[83] *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 114., 135 et seq.. Compare with *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, para. 112.

[84] See also RUBINS, N., *The notion of Investment in International Investment Arbitration*. In HORN, N. (Ed.), *Arbitrating Foreign Investment Disputes*. The Hague : Kluwer Law International, 2004, p.284 ; YALA, F., The notion of Investment in ICSID Case Law: A Drifting Jurisdictional Requirement? In *Journal of International Arbitration*, Vol. 22/2005, p. 105.

enterprise resident in one economy by an investor resident in another economy is evidence of such a relationship."[85] It shall be noted that the definition stated above was designed for statistical purposes, i.e. for the purposes of investment protection by BITs this strict threshold does not apply and the identifying criteria of lasting link and managerial control are determined on a case-by-case basis.

2.3.2 EU Law

Even after the entry into force of the Lisbon Treaty there is no definition of foreign investment provided for in primary EU law.

2.3.2.1.1 Foreign Direct Investment

The Lisbon Treaty has introduced the term "foreign direct investment" into provisions regulating the common commercial policy (Part Five (*the Union's External Action*), Title II TFEU (*Common Commercial Policy*); Article 206 TFEU et seq.). Prior to the entry into force of the Lisbon Treaty the term "direct investment" was used within the chapter regulating the freedom of capital movements. In fact, even TFEU contains the term "direct investment" in its Article 64 dealing with capital movements. The main distinction between the terms used in Article 207 (1) TFEU and Article 64 TFEU lies in the fact that Article 207 (1) TFEU is aimed at external action of the EU whereas Article 64 TFEU relates to the internal market. The mentioned distinction has implications over interpretation of the term.

2.3.2.1.2 Interpretation of "Direct Investment"

Interpretation of the term "foreign direct investment" found in Article 207 TFEU means interpreting a term of EU law, which is, at the same time, frequently used in international law and, more importantly, refers to the EU's external action.

This constellation is, however, not new to EU law and the ECJ jurisprudence. Similar issue arose in relation with the term "trade in services" within the framework of the common commercial policy in which case the ECJ concluded that the term "trade in services" shall be interpreted in accordance with its international law connotations (i.e. in accordance with the international trade practice) rather than by reference to the interpretation of the mentioned term found in the chapter on provision

[85] OECD, *Benchmark Definition of Foreign Direct Investment*, 4th edn., 2008, p. 48.

of services in primary EU law[86]. Thus, similarly, "*the international law definition is more important for defining FDI within the scope of the CCP*"[87].

Nevertheless, the interpretation of "direct investment" within EU law corresponds with the definition used in international law.[88]

Additionally, the Court of Justice has already interpreted the notion of "direct investment": *"the concept of direct investments concerns investments of any kind undertaken by natural or legal persons and which serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which that capital is made available in order to carry out an economic activity. /As regards shareholdings in new or existing undertakings… the objective of establishing or maintaining lasting economic links presupposes that the shares held by the shareholder enable him, either pursuant to the provisions of the national laws relating to companies limited by shares or otherwise, to participate effectively in the management of that company or in its control."*[89]

And further with regard to the distinction between direct and portfolio investments, the Court identifies direct investments to be *"namely investments in the form of participation in an undertaking through the holding of shares which confers the possibility of effectively participating in its management and control"* whereas portfolio investments are considered to be *"investments in the form of the acquisition of shares on the capital market solely with the intention of making a financial investment without any intention to influence the management of the undertaking"*[90].

The same interpretation is advocated by the Commission itself as suggested in the Communication: *"Foreign direct investment (FDI) is generally considered to include any foreign investment which serves to establish lasting and direct links with the undertaking to which capital is made available in order to carry out an economic activity. When investments take the form of a shareholding this objective presupposes*

[86] CJEU Opinion 1/2008, paras. 119-121 (as cited in DIMOPOULOS, A., *EU Foreign Investment Law*. Oxford : Oxford University Press, 2011, p. 42, supra ft. 168).
[87] DIMOPOULOS, A., *EU Foreign Investment Law*. Oxford : Oxford University Press, 2011, p. 42.
[88] See e.g. EECKHOUT, P., *EU External Relations Law*. Oxford: Oxford University Press, 2011, p. 64.
[89] Case C-446/04 *Test Claimants in the FII Group Litigation* (2006), para. 181-2. The Court referrs to the Capital *Directive 88/361/EEC for the implementation of Article 67 of the Treaty* (expired now), which comprised nomenclature and categorization of capital movements.
[90] Case C-171/08 *Commision v. Portugal* (2010), para. 49. See also Joined Cases C-282/04 and C-283/04 *Commission v. Netherlands* (2006), para. 19; Case C-222/97 *Trummer and Mayer* (1999), para. 21; *Commission v. France*, para. 36-37; *Commission v. United Kingdom*, para. 39-40.

that the shares enable the shareholder to participate effectively in the management of that company or in its control. This contrasts with foreign investments where there is no intention to influence the management and control of an undertaking. Such investments, which are often of a more short-term and sometimes speculative nature, are commonly referred to as "portfolio investments".[91]

It might be concluded, that the definition of "foreign direct investment" as found in Article 207 (1) TFEU over which the EU exercises exclusive competence covers investments in the form of a participation in an undertaking, provided that there exists a lasting and direct link between the investor and the undertaking, i.e. that there the investor participates effectively in the management of such undertaking or is in control of it. To determine whether the condition of "effective participation" or "control" is given, a reference to national legislation might be, according to the case law, taken.[92]

2.3.2.1.3 Other Forms of Investments

As it was outlined in Chapter 2.2 (*EU Competence*), the scope of forms of investments to be regulated exclusively by the EU as established under Article 207 (1) TFEU is limited to direct investments and, though arguably, can only be extended on a basis of shared implied external competence. The scope of forms of investments covered will, therefore, depend on willingness of the EU to conclude mixed agreements.

2.3.3 Concluding notes

First, the term "foreign direct investment" was introduced to by the Lisbon Treaty in the common commercial policy. This term, however, covers only limited number of forms that a foreign investment is allowed to take under BITs.

Second, the EU enjoys exclusive competence to regulate investments in the form of a participation of a third country investor in an undertaking established or

[91] The Communication further referrs to Judgment of 12 December 2006, *Test Claimants in the FII Group Litigation*, Case C-446/04, ECR p. I-11753, para. 181. See also e.g. the Judgments of 24 May 2007, *Holböck*, C-157/05, ECR. p. I-4051, para. 34; 23 October 2007, *Commission/Germany*, C-112/05, ECR p. I-8995, para. 18; 18 December 2007, *Skatterverket v A*, C- 101/05, para. 46; 20 May 2008, *Orange European Smallcap Fund*, C-194/06, para. 100; 14 February 2008, *Commission/Spain*, C-274/06, para. 18; and 26 March 2009, *Commission/Italy*, C-326/07, para. 35.

[92] See also WOOLCOCK, S., *The EU Approach to International Investment Policy after the Lisbon Treaty*. Directorate-General for External Policies, 2010, p. 12: *"Hence, a theoretically identical capital placement might be considered as portfolio investment in one state and as FDI in another."*

having effective seat within the EU, provided that there exists a lasting and direct link between the investor and the undertaking, i.e. that there the investor participates effectively in the management of such undertaking or is in control of it (and *vice versa*).

Third, the actual scope of definition will depend on the nature of future EU IIAs.

2.4 Admission and Promotion

2.4.1 BITs

2.4.1.1 Freedom to regulate

The common obligation of the contracting parties concerning the promotion and admission of FDI provided for in BITs states that *each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to make investments in its territory and shall admit such investments in accordance with its laws and regulations*.

The provision stated above shall not be seen as a mere proclamation. Quite the contrary, it is to be understood as a major concession of a sovereign state, since there is no obligation ensuing from international law obliging states not to limit the entry of foreign investments into their territories. As Sornarajah puts it : *"The right of a state to control the entry of foreign investment in unlimited, as it is a right that flows from sovereignty. The entry of any foreign investment can be excluded by a state. But, a sovereign entity can surrender its rights even over a purely internal matter by a treaty. Some regional and bilateral treaties now provide for the right of entry and establishment of investments to the national of contracting states. Where such pre-establishment rights are created by treaty, the denial of a right to entry to any investor from one of the contracting parties would amount to a violation of the treaty, unless it can be shown that his investment is not covered by the treaty."*[93].

Nevertheless, generally speaking, BITs do not concentrate on the promotion and admissions, i.e. pre-entry stage much. *"IIAs typically do not provide national treatment or most-favoured-nation treatment (MFN treatment) with respect to the admission or establishment of foreign investors or investments or provide other general rights of entry fore foreign investors or investment. Most IIAs provide protection only after foreign investors or investments have been admitted into the host state in accordance with local law."*[94]

2.4.1.2 Conditions to entry

[93] SORNARAJAH, M., *The International Law on Foreign Investment*. Cambridge: Cambridge University Press, 2010, p.88. See also NEWCOMBE, A., PARADELL, L., *Law and Practice of Investment Treaties*. The Hague: Kluwer Law International, 2009, p. 121-2.
[94] NEWCOMBE, A., PARADELL, L., *Law and Practice of Investment Treaties*. The Hague: Kluwer Law International, 2009, p.122.

Since it is the right of a sovereign state to exclude the entry of foreign investments completely, a host state also enjoys the right to attach conditions to such an entry[95]. *"The power of exclusion implies the power to admit conditionally and withdraw the licence to do business where the condition is not satisfied. The rule is universally recognized."*[96]

Such restrictions would not be in most cases explicitly stated in a BIT. In general, limitations on the entry of foreign investments are ensuing from national laws. *"The law of the host state could specify the legal vehicle through which the foreign investment should be made, the nature of the capital resources that should be brought from outside the state, the planning and environmental controls that the manufacturing plant should be subject to, the circumstances of the termination of the foreign investment and other like matters."*[97]

Coming hand-in-hand with financial crisis the term "investment protectionism" is entering the world of FDI. The major monitoring institutions expect intensified restrictive policies. "*Achieving a balance between the sovereign right to regulate an industry, and the need to avoid investment protectionism, remains a major policy challenge. It is complicated by the fact that there is no internationally recognized definition of "investment protectionism". Clarifying the term would require distinguishing between justified and unjustified reasons to restrict FDI. The motivations for FDI restrictions are manifold and include, for instance, sovereignty or national security concerns, strategic considerations, socio-cultural reasons, prudential policies in financial industries, competition policy, infant industry protection or reciprocity policies. In each case, countries may have very different perceptions of whether and under what conditions such reasons are legitimate."*[98]

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[95] SORNARAJAH, M., *The International Law on Foreign Investment*. Cambridge: Cambridge University Press, 2010, p.89.
[96] SORNARAJAH, M., *The International Law on Foreign Investment*. Cambridge: Cambridge University Press, 2010, p.89.
[97] SORNARAJAH, M., *The International Law on Foreign Investment*. Cambridge: Cambridge University Press, 2010, p.90.
[98] See UNCTAD, *World Investment Report 2011*, p. 110 and p. 98-99 on examples of restrictive measures on foreign investors in 2010/2011: *„Australia rejected Singapore Exchange's US$8.3 billion offer to take over Australian Securities Exchange, which it concluded was not in Australia's national interest./Brazil reinstated restrictions on rural land-ownership for foreigners by modifying the way a law dating back to 1971 is to be interpreted. The reinterpreted law establishes that, on rural land-ownership, Brazilian companies which are majority owned by foreigners are subject to the legal regime applicable to foreign companies./The Minister of Industry of Canada announced the blocking of*

In summary, sovereign states are free to determine the level of their openness to foreign investment. Although, BITs provide for the obligation of contracting states to admit foreign investments, contracting states are free to regulate the entry via national legislation. What BITs do cater for is the fact that a foreign investment can only be dismissed on the basis of valid national legislation of a host state.

2.4.1.3 Pre-Entry Screening

Most BITs provide for the right of entry on the condition that investment is made *in accordance with the laws and regulations of the host state*. Thus, the right to entry is not an absolute right and is often subject to limitations imposed by national legislation as was stated above. [99]

The States might in addition institute special administrative procedures aimed at the screening of a potential investment before the entry into its territory, for instance by requiring a feasibility study. Not complying with the screening procedure or a dishonest conduct on the part of the investor might further result in the denial of protection offered by the respective treaty on the ground that the investment was secured illegitimately.[100]

2.4.1.4 Incentives

Encouraged by a generally accepted view that foreign investment generates economic growth State are likely to open up its market to foreign investment without much restriction. Indeed, competition among States for foreign investment and States are designing incentive programs to lure the potential investors into their territory. Such initiatives do often take the form of a single piece of legislation so that the investors could better acquaint themselves with the benefits on offer[101].

And, generally speaking, they are free to do so. *"There is ... nothing in international law which prevents the granting of ... tax holidays and incentives.*

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the Australian mining company BHP Billiton's US$39 billion takeover of Potash Corp. (a Canadian fertilizer and mining company)"

[99] SORNARAJAH, M., *The International Law on Foreign Investment*. Cambridge: Cambridge University Press, 2010, p.104. Such as „made in accordance with the laws and regulations" of the host state.

[100] SORNARAJAH, M., *The International Law on Foreign Investment*. Cambridge: Cambridge University Press, 2010, p.104.

[101] SORNARAJAH, M., *The International Law on Foreign Investment*. Cambridge: Cambridge University Press, 2010, p.90.

Whether such an incentive should be given or not is a matter that lies within the discretion of the state authorities."[102]

However, once a State undertakes international obligations in relation to foreign investments it is likely that incentive might collide with such obligations. There is a threat that incentives might result in discriminatory conduct or in violation of national treatment and most-favoured-nation treatment. *"But, provided an adequate basis for the differential treatment, such as the need to attract certain types of technology or to direct the foreign investor into certain channels of production, can be shown, there will be no illegality involved in such discrimination."*[103] Further, they might be in breach with the provisions of the TRIMS.[104]

2.4.2 EU Law

Granting exclusive competence to the EU over foreign direct investments raises questions as to what the scope of protection shall be covered within such conferral of power.

In no case, however, it was disputed, that the EU exclusive competence covers the admission and promotion of foreign direct investments. This is supported primarily by the fact that the competence over foreign direct investment is part of a wider exclusive competence over the common commercial policy, which is aimed directly at eliminating trade restrictions and liberalization.

However, the admission of foreign investments under EU law employs a different terminology from the one found in BITs. For better understanding of the subject a reference to the internal market rules shall be taken.

Though not stated explicitly, the admission and encouragement of foreign investments is regulated by the provisions on the freedom of capital movements and the freedom of establishment. Besides the mentioned primary EU law regulation the admission and encouragement of foreign investments is often provided for in EU IIAs.

2.4.2.1 Capital movements

[102] SORNARAJAH, M., *The International Law on Foreign Investment*. Cambridge: Cambridge University Press, 2010, p.103.
[103] SORNARAJAH, M., *The International Law on Foreign Investment*. Cambridge: Cambridge University Press, 2010, p. 103.
[104] SORNARAJAH, M., *The International Law on Foreign Investment*. Cambridge: Cambridge University Press, 2010, p.103.

Although such conclusion is not undisputed, the EU has unilaterally liberalized capital movements not only within the EU but also with third countries[105]. It shall be noted, however, that no reciprocity is offered in consideration, i.e. the flow of capital might be restricted from the part of the relevant third country. [106]

The liberalization is grounded in Article 63 TFEU (*"Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.")* and comprises capital movements as specified by the ECJ case law and the illustrative list forms of capital movements annexed to the Directive 88/361/EEC mentioned above.

The scope of Article 63 TFEU shall be interpreted broadly so as to include not only discriminatory measures but also measures that are "liable to dissuade" or "liable to deter" investors form making capital movement. [107]

Nevertheless, the liberalization is not unlimited as the EU and Member States have retained the right to impose restrictions in circumstances provided for in Articles 64 to 66 TFEU.

Even though in accordance with Article 4(2)(a) TFEU the competence in substantive freedoms is shared, the fact that extensive internal legislation exists in the field as well as the fact that the scope of Article 65 providing for restrictive measures to be potentially adopted by Member States, *"the potential scope and content of Member State action is actually severely limited"*. [108]

2.4.2.2 Establishment

Under the provisions on establishment the admission of investment in the form of primary or secondary establishment shall be unrestricted. The freedom, however, applies only to the nationals of the EU.

Who the national of the EU is, is determined in Article 20 (1) TFEU, which states that: *"Every person holding the nationality of a Member State shall be a citizen of the Union."* It is, however, further by Article 54 TFEU stating that: *"Companies or*

[105] Upon the entry into force of the Maastricht Treaty in 1992.
[106] DIMOPOULOS, A., *EU Foreign Investment Law*. Oxford : Oxford University Press, 2011, p. 50-51.
[107] DIMOPOULOS, A., *EU Foreign Investment Law*. Oxford : Oxford University Press, 2011, p. 76-77.
[108] DIMOPOULOS, A., *EU Foreign Investment Law*. Oxford : Oxford University Press, 2011, p. 78.

firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States. 'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making."

It transpires that the distinction between the freedom of establishment and the freedom of capital movements is essential. Dimopulous attempts to describe the difference by stating that *"...freedom of capital movements does not concern the establishment of an FDI, but only the capital transfers relating to FDI, for example the act of the acquisition of shares or the transfer of dividends. The conditions under which the capital linked with a direct investment can be used, for example shareholder's rights, is the subject matter of the freedom of establishment."*[109] And further specifies that *"regulation of establishment aims at the identification and gradual abolition of the domestic regulatory restrictions that impede market access to foreign investors, such as foreign equity ownership limitations, quantitative restrictions, administrative authorizations, and restrictions on the legal form of establishment."*[110]

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The EU on the basis of its limited and dispersed pre-Lisbon competences within the field, concluded a number of international agreements on the ground of which the access to market was granted also to third country investors in the EU and vice versa. [111]

The mentioned agreements include the GATS and certain international treaties concluded by the EU that affect international investments such as: the European Economic Area Agreement (see Articles 40 to 45), the Association Agreement with Turkey, the Stability and Association Agreements with Balkan countries, the Euro-Mediterranean Agreements, the Partnership and Co-operation Agreements, the

[109] DIMOPOULOS, A., *EU Foreign Investment Law*. Oxford : Oxford University Press, 2011, p. 82.
[110] DIMOPOULOS, A., *EU Foreign Investment Law*. Oxford : Oxford University Press, 2011, p. 52.
[111] DIMOPOULOS, A., *EU Foreign Investment Law*. Oxford : Oxford University Press, 2011, p. 52.

Association Agreements with Mexico, Chile, Korea, South Africa, CARIFORUM states and the Energy Charter Treaty.

As far as the treaties affecting international investment are concerned the level of liberalization is not uniform and always depends on wording of the relevant treaty. Basically, EU IIAs provide for the extension of the four freedoms and other internal market rules to the other signatory in a modified scope depending on the level of association or cooperation intended to be attained in the respective relations between the signatories.

2.4.3 Concluding notes

First, EU law regulates the admission and promotion of investments more intensively than BITs.

Second, BITs in most cases contain merely a general statement providing for encouragement, creation of favourable conditions for investors to make investments and admission of investments in accordance with its laws and regulations. The potential restrictions to entry as well as incentives and administrative procedures required prior to the entry are usually provided for in national legislation. This procedure is fully compatible with the sovereign right to refuse or attached conditions to any foreign investment.

Third, on the other hand EU law concentrates primarily on the entry of foreign investments (market access, liberalization, principle of non-discrimination), although not explicitly referring to it as such. The relevant regulation is covered by the internal market rules on the freedom of capital movements, establishment and services along with, for instance, competition and state aid rules, which are capable of imposing restrictions on the entry of foreign investment. The restriction that could be imposed in relation to the liberalized and non-discriminatory approach required by the "four-freedoms" rules are explicitly stated in primary EU law. The terminology mentioned above is likely to be found in future EU IIAs.

Fourth, the regulation of foreign investments had been even prior to the entry into force of the Lisbon Treaty provided for in EU IIAs, especially be means of extending the internal market rules in modified version to signatories.

Fifth, there is no dispute as to the competence of the EU over the market access of foreign directed investments under Article 207 TFEU.

2.5 Standards of Treatment and Protection

Two sets of standards evolved in the protection of international investments: relative - aiming at elimination discrimination among investors on the basis of their nationality and absolute standards[112] aiming at providing investor with a basic level of protection. When considering relative standards as the national treatment or most-favoured-nation treatment one refers to two sets of conditions: the circumstance of the investment being discussed and the circumstances found in relation to other investments or investors. On the other hand, when assessing compliance with absolute standards one refer solely to the circumstance of the investment or investor being discussed without comparing the situation with the one of any other investor or investment.

2.5.1 BITs

2.5.1.1 Relative standards of treatment

Most-favoured-nation (the "MFN") treatment may be defined as "*treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favourable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State*."[113]

MFN complements the national treatment (the "NT") in prohibiting discrimination in that that MFN extends the benefits granted to one foreign investor to other investors covered by the MFN clause. On the other hand, NT prevents discrimination of foreign investors against the domestic investors. Both are based on the principle of equal treatment and non-discrimination in cross-border situation.

Frequently the clauses are of the following wording: *Each Contracting Party shall in its territory accord to investments and returns of investors of the other Contracting Party treatment which is fair and equitable and not less favourable than that which it accords to investments and returns of its own investors or to investments and returns of investors of any third State, whichever is more favourable.*

[112] Sometime called „non-contingent" standard.
[113] Report of the International Law Commission to the General Assembly, *Draft Articles on Most-Favoured-Nation Clauses*, ILC Report, A/33/10, 1978, Art. 5.

Each Contracting Party shall in its territory accord to investors of the other Contracting Party, as regards management, maintenance, use, enjoyment or disposal of their investment, treatment which is fair and equitable and not less favourable than that which it accords to its own investors or to investors of any third State, whichever is more favourable.

MFN or NT clauses are, however, not to be used in relation to advantages accorded to foreign investors ensuing from a membership in a customs, economic, or monetary union, a common market or a free trade area. At the same time, obligations by which a member of such union is bound shall be respected by the other contracting party. The wording of the mentioned clauses might be, for instance, of the following wording: *The National Treatment and Most-Favoured-Nation Treatment provisions of this Article shall not apply to advantages accorded by a Contracting Party pursuant to its obligations as a member of a customs, economic, or monetary union, a common market or a free trade area.*

The Contracting Party understands the obligations of a Contracting Party as a member of a customs, economic, or monetary union, a common market or a free trade area to include obligations arising out of an international agreement or reciprocity agreement of that customs, economic, or monetary union, common market or free trade area.

2.5.1.2 Absolute standards of treatment

There is an on-going discussion on what actually constitutes the contents of FET, i.e. what exactly constitutes the standard against which the measures of the host State shall be assessed. A range of alternative standard appears on offer: the standard embodied in the international minimum standard required by the customary law[114], the standard constituted by all the international law and its sources[115] or whether FET is an autonomous treaty standard.

Nevertheless, a number of elements of FET can be distinguished clarifying the notion of FET.

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[114] *Alex Genin v. The Republic of Estonia*, ICSID Case No. ARB/99/2, 25 June 2001; *Asian Agricultural Products Ltd. v. Sri Lanka,* ICSID Case No. ARB/87/3, Award of 27 June 1990; *AMT v. Congo*, Award of 21 February 1997; *U.S. v. Italy (Elettronica Sicula Spa (ELSI)* case), 1989 ICJ Reports 15.

[115] *Metalclad Corp. v. United Mexican States,* ICSID Case No. ARB(AF)/97/1, Award of 30 August 2000.

First, FET covers the obligation of vigilance and protection in relation to foreign investment. FET is often examined hand in hand with the principle of full protection and security, with the latter standard essentially arising in cases when foreign investment is affected by physical damage.[116]

Second, FET is considered to ensure due process and protection against denial of justice and arbitrariness. In its broadest sense, FET is thought to cover all types of wrongful conduct of the State, i.e. acts or omissions of the authorities representing all three branches of government. When interpreted more restrictively, FET is considered to provide protection against improper administration of proceedings such as denial of access to courts, inadequate procedures or unjust decisions. In its narrowest sense, FET can be interpreted as a refusal of the host State to grant to the investors access to justice. [117]

Third, FET is thought to require transparency, respect of the investor´s legitimate expectation and good faith.[118]

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Full protection and security principle (the „FSP") does not receive as much attention in investment arbitrations as, for instance protection against expropriation.

At minimum it requires "*the abstention of the host state*[119] *from interference with the rights of the investors, in particular violations of his or her property*", though it might interpreted so as to include „*positive action by the host state to protect foreign investment through preventive and repressive action, and also against harm*

[116] *Asian Agricultural Products Ltd. v. Sri Lanka,* ICSID Case No. ARB/87/3, Award of 27 June 1990; *AMT v. Congo*, Award of 21 February 1997; *Wena Hotels v. Egypt,* ICSID Case No. ARB/98/4.

[117] OECD, *International investment law: a changing landscape*, p.109-110. See also *U.S. v. Italy (Elettronica Sicula Spa (ELSI)* case), 1989 ICJ Reports 15; *Compagnia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Arg. Republic*, ICSID Case No. ARB/97/3, Award, August 20, 2007; *Middle East Cement Shipping & Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, April 12, 2002; *Ronald S. Lauder v. Czech Republic*, (UNCITRAL), Award, 3 September 2001.

[118] *Metalclad Corp. v. United Mexican States,* ICSID Case No. ARB(AF)/97/1, Award of 30 August 2000; *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, November 13, 2000; *Tecnicas Medioambientales TECMED S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003.

[119] On determining when a harm is caused by the host state see: *Asian Agricultural Products Ltd. v. Sri Lanka,* ICSID Case No. ARB/87/3, Award of 27 June 1990, para. 85; *Saluka Investments BV v. Czech Republic*, UNICTRAL, Partial Award, March 17, 2006, para. 490-496; *Biwater Gauff Tanzania v. United Republic of Tanzania,* ICISD Case NO. ARB/02/25, Award, July 24, 2008, para. 731.

caused by private actors[120]". When simplified, the FSP refers to *„duty to provide police power protection*[121]*"* and *„duty to provide legal protection*[122]*"*.[123]

2.5.2 EU Law

Besides the doubts over what forms of foreign investments shall be covered under Article 207 TFEU, further uncertainties arise over the scope of protection which is to be provided thereunder.

There are no explicit restrictions placed on the scope of protection included in Article 207 TFEU. Thus, it might be argued, that *"for reasons of efficiency and practicability (effet utile) the EU should possess the competence for all possible aspects of (foreign direct) investment promotion and protection"*[124]. The argument is further support by the fact that the common commercial policy is no longer confined to trade aspects as intellectual property right as well as foreign direct investments were included in the policy and are strongly related to protection of property.[125]

On one hand, it might be argued that the scope of the protection for which the competence of the EU is established under Article 207 TFEU encompasses merely investment liberalization[126], i.e. market access, pre-establishment and national treatment, excluding post-establishment standards of treatment, protection or expropriation, as it forms part of the common commercial policy aimed at eliminating

[120] On the duty of hosts state to ptotect against harm caused by other actors see *Asian Agricultural Products Ltd. v. Sri Lanka,* ICSID Case No. ARB/87/3, Award of 27 June 1990, para. 26; *Tecnicas Medioambientales TECMED S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, para. 176.

[121] See *Tecnicas Medioambientales TECMED S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, para. 177; *Asian Agricultural Products Ltd. v. Sri Lanka,* ICSID Case No. ARB/87/3, Award of 27 June 1990, para. 48; *Wena Hotels v. Egypt,* ICSID Case No. ARB/98/4, para. 84; *Azurix Corp v. Argentine Republic,* ICISD Cse No. ARB/01/12, Final Award, 14 July, 2006, para. 408.

[122] See *Wena Hotels v. Egypt,* ICSID Case No. ARB/98/4, para. 82-4, 94-5; *Ronald S. Lauder v. Czech Republic*, (UNCITRAL), Award, 3 September 2001, para 308; *CME v. Czech Republic*, (UNCITRAL), Award, September 13, 2001, para. 356.

[123] ZEITLER, H.E., *Full Protectiona and Security.* In SCHILL, S.W., *International Investment Law and Comparative Public Law*. Oxford: Oxford Universtiy Press, 2010, p. 183 et seq.

[124] BUNGENBERG, M., Going global? The EU Common Commercial Policy After Lisbon. HEMRANN, C., TERHECHTE, J.P. (Eds.), European Yearbook of International Economic Law. London: Springer, 2010, p. 144.

[125] BUNGENBERG, M., *Going global? The EU Common Commercial Policy After Lisbon*. HEMRANN, C., TERHECHTE, J.P. (Eds.), *European Yearbook of International Economic Law*. London: Springer, 2010, p. 144.

[126] See, for instance, KRAJEWSKI, M., *External Trade Law and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy?* Common Law Review, 2005, p. 91 et seq.

barriers to trade. Further, Article 206 TFEU[127] identifies the objectives of the common commercial policy and it might be used when interpreting whether the reference to foreign direct investment should be interpreted to cover only trade-related aspects or the entire area of foreign direct investment.

On the other hand, a more generous competence might be desired so as to enable the EU to conclude agreements resembling US free-trade agreements, in which case the competence granted under Article 207 TFEU would encompass market access, both pre- and post-establishment standards of treatment and protection, protection against expropriation as well as a mechanism for investor-state dispute-settlement.

Nevertheless, Article 207 (6) TFEU, known also as "parallelism clause", shall be considered in this respect. The mentioned Article rules out the competence of the EU which are excluded from the power of the EU by EU legislation itself such as public health, cultural or social services. Therefore, the extent of such an absolute standard or protection offered would depend on whether the EU is entitled to take such measures internally.[128] It view is advocated even by, for instance, Ceyssens who is a proponent of the EU competence under Article 207 TFEU covering both liberalization and investment. Referring to the Opinion 1/95 of the CJEU, Ceyssens argues that since there is no internal policy providing for absolute standard treatment such as FET (as a different example he mentions expropriation) there is "no need to protect the uniformity of EU rules by conducting a common commercial policy".[129]

2.5.2.1 Primary EU law

As the practice shows, even in its international agreements the EU tends to keep the terminology used in the internal market rules.

Within the framework of primary EU law the relative standards, i.e. the national treatment and the most favoured nation treatment, are, though arguably, covered by the principle of non-discrimination.

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[127] Article 206 TFEU: *„By establishing a customs union in accordance with Articles 28 to 32, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers."*

[128] DIMOPOULOS, A., *Creating an EU Investment Policy: Challenges for the Post-Lisbon Era of External Relations*. In CARDWELL, P.J. (Ed.), *EU External Relations Law and Policy in the Post-Lisbon Era*. The Hague: Springer, 2012, p. 408.

[129] CEYSSENS, J., *Towards a Common Foreign Investment Policy? Foreign Investment in the European Constitution*. In *Legal Issues of Economic Integration*, 2005, Vol. 32, No. 3, p. 281.

There is no explicit provision providing for NT treatment in EU primary law. NT is, however, covered by the EU law by the fact that Member State cannot grant to a national from another Member State less favourable treatment than it has offered to its own national or a national of a third country, or in other words, the discrimination on the grounds of nationality is prohibited.

Non-discrimination is secured by the provisions on the four freedoms and the general prohibition of discrimination on the basis on nationality is provided for in Article 18 TFEU: *"Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."*

2.5.2.2 EU IIAs

„Provisions on establishment and post-establishment treatment of FDI are included in the majority of EU IIAs, namely the EEA Agreement, all SAAs, all PCAs, the EMAs with Jordan and Algeria, and the Association Agreements with Korea, the CARIFORUM states, Chile, and Mexico include substantive provisions on establishment and post-establishment treatment of FDI. With the exception of the ECT, which follows the structure of BITs, EU IIAs have certain characteristics that differentiate them from traditional BITs."[130]

EU IIAs, in most cases, follow either the regulatory model of GATS or primary EU law, which makes their content in certain aspects different from BITs.

Concerning the standards of treatment the EU IIAs are usually based on the principle of non-discrimination[131] complemented by MFN or NT. In some EU IIAs there are provisions granting MFN or NT on a basis of a list of economic activities, i.e. on a enumerative basis.

Besides different terminology and absence of absolute standards of treatment there are some other disparities between EU IIAs and BITs concerning the standards of treatment. For instance, EU IIAs, though not all of them, do not strictly differentiate between establishment and post-establishment protection, i.e. the same standard of treatment applies to both stages. Further, importance shall be paid to actual wording of a particular EU IIA, since the definition of establishment as well as

[130] DIMOPOULOS, A., *EU Foreign Investment Law*. Oxford : Oxford University Press, 2011, p. 146.
[131] See, for instance, Article 31 (2) of the EEA prohibiting discrimination of the operation of foreign investors on the basis of nationality.

that of capital movement may differ, i.e. be more restrictive than the definition applied within primary EU law.[132] Additionally, some of EU IIAs are restricted to a specific sector.[133]

As suggested by Dimopolous a specific approach shall be adopted when assessing the standards to treatment provided for in EU IIAs: *"... an examination of the EU IIA provisions on the establishment and post-establishment treatment of FDI requires initially a determination of their specific scope; secondly, a critical assessment of the different standards of treatment included therein and thirdly, the examination of specific issues relating to establishment, such as the movement of key personnel."*[134]

MFN could be considered to be subsumed in NT as reflected by the rules on non-discrimination. However, if an implied MFN clause would be applied to the network of BITs concluded by Member States, it might undermine the whole network of BITs since it would render the principles of reciprocity inherent in bilateral treaties useless as any investor would be able to claim the most favourable treatment established by one of BITs concluded by a particular Member State. See also the first part of this chapter on the provision contained in BITs reflecting benefits ensuing from membership.

There is a question of what benefits granted to investors by other IIAs concluded by the host state shall be covered by MFN clause. The issue is particularly important since most BITs provide inter alia for investor-state arbitration as an available means of resolving disputes relating under particular BIT. Similarly, EU IIAs do not in most cases provide for the protection against expropriation whereas such protection is granted under BITs. In case when MFN would be interpreted broadly foreign investors could claim breaches of the provisions on investor-state arbitration or expropriation provided for by other IIAs concluded by the host state.

Such interpretation would, however, go contrary to the principle of *eiusdem generis* principle according to which MFN clause could be used only for matters covered by both agreements and shall not be extended to provide access to provisions which are not provided for in former agreement. Therefore, MFN clause included in

[132] DIMOPOULOS, A., *EU Foreign Investment Law*. Oxford : Oxford University Press, 2011, p. 146-147.
[133] Such as the GATS (limited to serrvices) and the ECT (limited to energy sector).
[134] DIMOPOULOS, A., *EU Foreign Investment Law*. Oxford : Oxford University Press, 2011, p. 148.

EU IIAs interpreted so as to grant the foreign investor access to, for instance, investor-state arbitration or the protection against expropriation provided under different agreement concluded by the host state.[135]

For the avoidance of doubt there is an explicit provision included in the FTA with Korea stating that MFN clause *"does not extend to the investment protection provisions not covered by this Chapter, including provisions relating to investor-state dispute settlement procedures"*. [136]

Further, it should be noted that there are usually no additional standards provided for in EU IIAs such as FET or the principle of full protection and security.[137] *"Existing EU IIAs lack an explicit reference to "absolute" standards of treatment, such as FET or Full Protection and Security, which are provided in BITs and traditional IIAs. ...However, this does not mean that EU IIAs do not offer, to a certain extent, a similar level of protection to foreign investments and investors."*[138]

2.5.3 Concluding notes

First, there exists a great divergence between the terminology relating to the standards of treatment used in EU law and in BITs. EU law (especially primary EU law) operates with the principle of non-discrimination, whereas BITs operate with NT and MFN clauses.

Second, it is argued that under EU law there are no counterparts of absolute standards, such as FET or FSP.

Third, MFN and NT clause have been used in EU IIAs in most cases depending on the desired level of cooperation or association to be attained among the signatories.

Fourth, as regards future EU IIAs the scope of protection (and therefore possible post-establishment regulation) is not yet settled. There are, however, no explicit restrictions imposed on the scope of protection to be provided under Article 207 TFEU.

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[135] See also *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, November 13, 2000, para 38-56.
[136] DIMOPOULOS, A., *EU Foreign Investment Law*. Oxford : Oxford University Press, 2011p. 160-1.
[137] With the exception of the ECT.
[138] DIMOPOULOS, A., *EU Foreign Investment Law*. Oxford : Oxford University Press, 2011, p. 163-4.

2.6 Expropriation

2.6.1 BITs

The protection against expropriation arose in reaction to nationalizations and control of the host state over concessions and state contracts.

Though massive expropriations and direct takings of property do not occur on daily basis, the protection against expropriation remains essential. The evolution of notion of expropriation shall be understood in a close link with the evolution of the concept of property within the framework of international investment. As the concept of property expanded so did the concept of expropriation that now includes, besides the direct taking, other forms of expropriation so that it essentially includes anything "tantamount or equivalent" to outright taking.

The clause on expropriation might be, for instance, of the following wording: *Investments of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation (hereinafter referred to as „expropriation") in the territory of the other Contracting Party except for a public purpose. The expropriation shall be carried out under due process of law, on a non-discriminatory basis and shall be accompanied by provisions for the payment of prompt, adequate and effective compensation. Such compensation shall amount to the value of the investment expropriated immediately before expropriation or impending expropriation became public knowledge, shall include interest from the date of expropriation, shall be made without delay, be effectively realizable and be freely transferable in a freely convertible currency.*

The investor affected shall have a right to prompt review by a judicial or other independent authority of that Contracting Party in which territory the investment has been made, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this Article.[139]

[139] In a study prepared for the EU, BITs were analysed with regard to clauses on expropriation with the following result: *"In a study of 51 BITs completed by EU member states in the last 10 years we found a mixed record, with many countries such as Germany, France and the Netherlands providing protection against indirect expropriation in close to half of their agreements. Italy did not cover indirect expropriation in any of the BITs analyzed, while the UK dealt with it in only one out of seven. See table 10. Moreover in none of the 23 BITs where indirect expropriation was covered, was it clearly defined. The controversy arises in terms of how to deal with non-compensable regulatory issues and most IIAs are silent on this, with no distinction made between compensable and non-compensable regulatory actions. French BITs refer to 'measures of expropriation or nationalisation or any other measures the*

Nowadays, it is especially the regulatory expropriation, which is valued most by foreign investors. On the hand, it might be argued that protection against regulatory expropriation might limit the freedom of policy making of host states. Out of this reason clauses providing that *legitimate government measures that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, and do not constitute indirect expropriations*.

2.6.2 EU Law

At present, the regulation of expropriation of foreign investment is not explicitly covered by TFEU or TEU.

However, Article 345 TFEU states that the Treaty does not affect the right of a Member State to decide whether an asset should be in public or private ownership. On the other hand, the ECJ has ruled that measure affecting private property shall be in accordance with the fundamental freedoms and in compliance with EU legislation in general.[140] Further, the expropriation shall at all times be proportionate to the objective, which shall at all times be legitimate and adequate compensation shall be provided.[141]

Further, Article 17 (Right to property) of the Charter on Fundamental Rights, which is of the same legal strength as the Treaties and can be invoked directly, provides that:

"1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

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effect of which would be direct or indirect dispossession'. UK BITs cover measures 'having effect equivalent to nationalisation or expropriation', while some agreements concluded by Sweden refer to 'any direct or indirect measure'". In WOOLCOCK, S., *The EU Approach to International Investment Policy after the Lisbon Treaty*. Directorate-General for External Policies, 2010, p. 37.

[140] See also Cases C-4/73 and C-84/95 as cited in DIMOPOULOS, A., *EU Foreign Investment Law*. Oxford : Oxford University Press, 2011, p. 18. See also Case C-452/01 (*Ospelt),* para. 24; Case C-302/97 (*Konle)*, para. 38; and Case C-182/83 (*Fearon)*, para. 7.

[141] Case C-182/83 (*Fearon*).

2. *Intellectual property shall be protected."*

The Communication of the Commission from July 2010 explicitly states that clauses on the protection against expropriation shall be part of future EU IIAs: *"the Union should include precise clauses covering this issue into its own future investment or trade agreements. A clear formulation of the balance between the different interests at stake, such as the protection of investors against unlawful expropriation or the right of each Party to regulate in the public interest, needs to be ensured".*[142]

In support of the intentions of the Commissions, it is argued that Article 345 TFEU mentioned above shall be interpreted narrowly so as to cover only the right of Member States to decide freely over whether to nationalize or privatize certain assets and does not, therefore, preserve any exclusive rights of Member States to determine expropriation[143], or in other words, *"it is strongly argued that Article 345 TFEU should be narrowly construed, which, together with the broad pronouncement of FDI competence under Article 207 TFEU indicates that Article 207 TFEU covers also protection of FDI against expropriation"*[144] See also the chapter on the competence of the EU.

Concerning EU IIAs, there is but one agreement that provide for the protection of expropriation – the Energy Charter Treaty. The main reason for this being that the ECT reflects the regulatory content of BITs rather than that of GATS or primary EU law.

2.6.3 Concluding notes

First, expropriation, especially its regulatory form, is one of the most valued provisions in BITs and is, especially recently, relied on heavily by foreign investors.

Second, there is no explicit provision found in EU law granting protection against expropriation. However, based on the case law of the ECJ expropriation

[142] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions *"Towards a comprehensive european international investment policy"*, COM(2010)343, p. 9.
[143] BUNGENBERG, M., *Going global? The EU Common Commercial Policy After Lisbon*. HEMRANN, C., TERHECHTE, J.P. (Eds.), *European Yearbook of International Economic Law*. London: Springer, 2010, p. 144.
[144] DIMOPOULOS, A., *Creating an EU Investment Policy: Challenges for the Post-Lisbon Era of External Relations*. In CARDWELL, P.J. (Ed.), *EU External Relations Law and Policy in the Post-Lisbon Era*. The Hague: Springer, 2012, p. 408.

measures shall be in breach with neither the fundamental freedoms (Article 17 of the Charter on Fundamental Rights), nor with the provisions on the four freedoms and shall be at all times proportionate and compensation shall be provided.

Third, considering that Article 345 TFEU shall be interpreted narrowly while at the same time Article 207 TFEU is likely to be interpreted broadly, there is no provision ruling out the inclusion of expropriation protection in future EU IIAs.

Fourth, the EU is, however, cautious when it comes to providing for protection against regulatory expropriation as it raises concerns over the regulatory freedom. A mere threat of compensation paid might in result in reluctance to adopt necessary policies especially in fields such as environmental protection.

2.7 Dispute Settlement

2.7.1 BITs

In accordance with Article 33 of the UN Charter embodying the principle of free choice of means for dispute settlement, States have adopted different modes of settlement of disputes arising out of foreign investments - the most frequent option being the investor-state arbitration.

The exact mechanism of dispute resolution will, of course, depend on the particular BIT. The arbitration clause contain in a BIT might provide for an institutionalized arbitration, such as before the ICSID, International Chamber of Commerce, London Court of International Arbitration etc., or opt for an *ad hoc* arbitration usually by determining applicable rules of arbitration, which is most cases would be the UNICTRAL arbitration rules.

The ICSID is a forum specifically designed to settle investor-state disputes, operating on the basis of the Washington Agreement and enjoys general respect.

„A few early IIAs do not provide an direct right of investor action at all, or they limit access to arbitration to certain specific treaty breaches, such as issues of expropriation and repatriation of profits. The great majority of IIAs, however, do provide aggrieved investors with a direct right to resort to arbitration with regard to any disputes arising from alleged treaty breached or more generally with regard to its investments.“

Pre-conditions to commencement of arbitration

BITs often provide for pre-conditions, which are to be satisfied in case of a dispute prior to submission of the dispute before the relevant forum. BITs often require that negotiation or consultation take place prior to actual arbitration.[145]

2.7.2 EU Law

As it is perceived to be one of the essential characteristics of investment law, the Commission is keen on including the possibility of investor-state dispute

[145] *Ronald S. Lauder v. Czech Republic*, (UNCITRAL), Award, 3 September 2001, para. 187; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, para. 88-103.

settlement similar to one found in BITs in future EU IIAs: "*Investor-state is such an established feature of investment agreements that its absence would in fact discourage investors and make a host economy less attractive than others*."[146]

So far, the EU aims at ensuring consistency with EU in decisions delivered by tribunals in investor-state arbitrations by *amicus curiae* briefs.

The main problem, however, is the fact that the CJEU has exclusive power to deliver opinion on the legality of measure adopted by the EU and is the only institution entitled to interpret EU law. Nevertheless, the CJEU has already recognized its jurisdiction to hear cases on alleged breaches of mixed agreements[147]. Therefore, in case future EU IIAs are concluded in form of a mixed agreements the CJEU would be competent to decide on violations of such treaties. The question remains whether third countries' investors would find such an option attractive since the EU would become throughout the CJEU *judex in re sua*.

Additionally, the EU is not a signatory of the ICSID Convention. Moreover, the Convention is open exclusively to states[148], meaning that an amendment of the Convention would be necessary for the EU to accede to the convention. Even the ICSID Additional Facility Rules are available only for dispute between states and nationals of other states.

The mechanisms providing for ICSID arbitration, however, can be employed even in future EU IIAs (i.e. when the EU assumes fully its exclusive competence and concludes investment agreement in replacement of the standing BITs), provided that there is a distinction between the responsibility of the EU and its Member States. in that case two situations shall be distinguished. First, in case when the disputed measure was taken by Member State a traditional investor-state dispute settlement might be employed. Second, in case when a EU measure is disputed a new mechanism for resolving such disputes would have to be created.

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[146] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions *"Towards a comprehensive european international investment policy"*, COM(2010)343, p. 10 As the main challenges the Commision identifies: transaprency, consitency and predictability of decisions and adequacy of arbitration rules.

[147] *Meryem Demirel v Stadt Schwabisch Gmund*, Case C-12/86; *Hermes International v FHT Marketing Choice BV*, Case C-53/96.

[148] See Article 67 of the ICSID Convention: *"This Convention shall be open for signature on behalf of States members of the Bank…"*

Concerning the potential use of other arbitration tribunals, especially ad hoc arbitrations under UNCITRAL arbitration rules, it is argued that, unlike in case of the ICSID arbitration the review of awards is vested with national courts. Further, the rules are not primarily trimmed to arbitration involving state entities, thus, for instance, awards rendered in such arbitration might be public – even when a public measure was challenged.

The EU will further have to decide what model of provisions on arbitration shall be employed: the EU or rather more prescriptive US model. Besides a more detailed procedure there are further difference such the fact that US model provides for participation of non-disputing parties, transparency, open hearings or submissions of amicus curiae, which are not found in European BITs.

There is a specific mechanism of dispute settlement provided for in EU IIAs. In most cases they follow the WTO regulatory model containing detailed procedures for dispute settlement. There is so far only one EU IIA that follows the settlement system found in BITs – the ECT[149].

2.7.3 Concluding notes

First, direct investor-state dispute settlement is seen as the major benefit granted by BITs. Currently, there is no provision in EU law providing for investor-state arbitration.

Second, the issue of responsibility with regard to the exclusive competence over FDI has still not been settled.

Third, without an amendment the ICSID is not open to the EU (or any other REIO).

Forth, in case future EU IIAs are concluded as mixed agreement the CJEU might be competent to hear disputes arising out of breaches of such EU IIAs.

Fifth, future EU IIAs might eventually provide for dispute-settlement to be conducted before other forum than the ICSID or for an ad hoc arbitration under, for instance, UNCITRAL arbitration rules. However, appropriateness of the mentioned arbitration procedures haw not yet been fully explored.

[149] The settlement of disputes between an investor and a contracting party is provided for in Article 26.

3. CONCLUSION

Both EU law and the network of BITs simultaneously cover the regulation of foreign investment. In spite of strikingly different terminology, the substantive coverage is essentially similar, though certain aspects crucial to investment protection are not explicitly provided for in EU law and, therefore, raise doubts.

The competence of the EU over foreign direct investment granted under Article 207 TFEU, which is considered to be the basis for the common investment policy as well as future EU IIAs, raises doubts both as to the scope of forms of investment covered as well as the scope of protection to be provided. Despite the fact that Article 207 TFEU refers explicitly only to foreign direct investments it does not mean that the EU cannot and will not (or even should not) be competent to include other forms of investments in future EU IIAs (by virtue of the doctrine of implied powers). Most importantly, the scope of protection of foreign (direct) investments is not yet settled. Depending on arguments pursued the actually scope of protection ranges from mere market access and liberalization through regulation except for absolute standards and expropriation to comprehensive regulation covering all aspects of foreign investment regulation regularly covered by BITs.

The term "foreign direct investment", which is to be crucial in defining the scope of the common investment policy and future EU IIAs, covers only limited number of forms that a foreign investment is allowed to take under BITs. Nevertheless, effectively any form of form of investment covered by BITs might by covered by relevant provision of EU law (even though they are not referred to as such under EU law). Furthermore, even as regards future EU IIAs the definition provided therein might be construed in a way to provide the same coverage as BITs do. Thus, even though not provided for in the Treaty explicitly, the definition of foreign investments in future EU IIAs might essentially cover the full scope of foreign investments considered to be protected by BITs.

Promotion and admission of foreign investments is regulated more intensively in EU law then BITs. BITs, in most cases, contain merely a general statement providing for encouragement, creation of favourable conditions for investors to make investments and admission of investments in accordance with its laws and

regulations. The potential restrictions to entry as well as incentives and administrative procedures required prior to the entry are usually provided for in national legislation. On the other hand, EU law concentrates primarily on the entry of foreign investments (market access, liberalization, principle of non-discrimination), although not explicitly referring to it as such. The relevant regulation is covered by the internal market rules on the freedom of capital movements, establishment and services along with, for instance, competition and state aid rules, which are capable of imposing restrictions on the entry of foreign investment. The restriction that could be imposed in relation to the liberalized and non-discriminatory approach required by the "four-freedoms" rules are explicitly stated in primary EU law. The terminology mentioned above is likely to be found in future EU IIAs. In fact, the regulation of foreign investments had been even prior to the entry into force of the Lisbon Treaty provided for in EU IIAs, especially be means of extending the internal market rules in modified version to signatories. Finally, there is no dispute as to the competence of the EU over the market access of foreign directed investments under Article 207 TFEU.

Standards of treatment and post-entry protection of foreign investments is one of the most debated issues concerning the new common investment policy. First, there exists a great divergence between the terminology relating to the standards of treatment used in EU law and in BITs. EU law (especially primary EU law) operates with the principle of non-discrimination, whereas BITs operate with NT and MFN clauses. On the other hand, MFN and NT clause have been used in EU IIAs in most cases depending on the desired level of cooperation or association to be attained among the signatories. In summary, as regards future EU IIAs the scope of protection (and therefore possible post-establishment regulation) is not yet settled.

There are, however, no explicit restrictions imposed on the scope of protection to be provided under Article 207 TFEU.

Expropriation, though intended to be included in future EU IIAs, involves certain controversy. Although expropriation, especially its indirect form, is one of the most valued provisions in BITs and is, especially recently, relied on heavily by foreign investors, arguments have been raised, referring primarily to the parallelism clause, against inclusion of expropriation protection in future EU IIAs. However, based on the case law of the ECJ expropriation measures shall be in breach with neither the fundamental freedoms (Article 17 of the Charter on Fundamental Rights),

nor with the provisions on the four freedoms and shall be at all times proportionate and compensation shall be provided. Further, considering that Article 345 TFEU shall be interpreted narrowly while at the same time Article 207 TFEU is likely to be interpreted broadly, there is no provision ruling out the inclusion of expropriation protection in future EU IIAs.

Investor-state arbitration is considered to by the major benefit to investors granted by BITs. However, a number of ensuing questions has yet to resolved as regards the possibility of the right to resort to investor-state arbitration under future EU IIAs: *inter alia*, identification of the most adequate forum, the issue of responsibility with regard to the EU's exclusive competence under Article 207 TFEU, the exclusive competence of the CJEU to decide the question of EU law and rule on the legality of EU measures.

Even though there is a great disparity in terminology employed by EU law and the one typical of BITs, it might be concluded that the EU is equipped sufficiently to cover the regulation of foreign investments to the extent covered by the present BITs concluded between Member States and third countries.

On the hand, there are numerous issues, which are of high importance, and are still not settled. The field is a new one and not enough research has been conducted so far to fully cover the uncertain or controversial issues. Moreover, certain questions are not be to answered by legal doctrine but are more of a policy question.

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5. SUMMARY (SK)

V rámci EU v súčasnosti prebieha významná zmena v regulácii zahraničných investícií spočívajúca v postupnom presune kompetencií z členských štátov na Európsku Úniu. Regulácia vstupu, štandardov zaobchádzania a ochrany zahraničných investícií je pritom tradične vnímaná ako prerogatív suverénnych štátov.

Plánovaným cieľom je vytvorenie spoločnej európskej investičnej politiky („*the common investment policy"*), ktorá nahradí súčasnú nejednotnú úpravu založenú na bilaterálnych investičných dohodách uzatvorených medzi jednotlivými členskými štátmi a tretími štátmi (*„bilateral investment treaties"*, ďalej tiež len *„BITs"*) tak, ako to vyplýva z Oznámenia Komisie s názvom "Na ceste ku komplexnej európskej medzinárodnej investičnej politike"[150] prijatom v júli 2010. 27 rozdielnych jurisdikcií by tak malo byť zjednotených v jednej spoločnej – celoeurópskej.

Základná otázka znie: Je vhodnejšie regulovať zahraničné investície na úrovni EÚ alebo na úrovni jednotlivých členských štátov?

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Ku kompetečnému presunu došlo do značnej miery na základě Lisabonskej zmluvy[151] s účinnosťou od 1. decembra 2009. Lisabonská zmluva, v čl. 207 odst. 1 Zmluvy o fungovaní Európskej únie (ďalej tiež len ZFEÚ)[152] zverila Európskej únii v rámci spoločnej obchodnej politiky výlučnú právomoc v oblasti priamych zahraničných investícií, tj. členské štáty nie sú naďalej, s určitým výnimkami, oprávnené vyvíjať legislatívnu činnosti ani uzatvárať medzinárodné zmluvy v oblasti priamych zahraničných investícií, pokiaľ tak nie je výslovne stanovené v predpisoch EÚ alebo sa nejedná o transpozíciu práva EÚ.

Zmenu však nie je vhodné vnímať ako radikálnu. Aj pred účinnosťou Lisabonskej zmluvy, aj keď jej právomoc bola obmedzená a rozstrieštená, EÚ

[150] Oznámenie Komisie Rade, Európskemu parlamentu, Európskemu hospodárskemu a sociálnemu výboru a Výboru regiónov *"Na ceste ku komplexnej európskej medzinárodnej investičnej politike"*, KOM(2010)343

[151] Lisabonská zmluva, ktorou sa mení a dopĺňa Zmluva o Európskej únii a Zmluva o založení Európskeho spoločenstva, podpísaná v Lisabone 13. decembra 2007, Úradný vestník C 306 z 17. decembra 2007.

[152] Čl. 207 odst. 1 ZFEÚ: *„Spoločná obchodná politika vychádza z jednotných zásad, najmä vo vzťahu k úpravám colných sadzieb, uzavieraniu colných a obchodných dohôd týkajúcich sa obchodu s tovarom a službami, k obchodným aspektom duševného vlastníctva, priamym zahraničným investíciám, zjednocovaniu liberalizačných opatrení, vývoznej politike, ako aj k opatreniam na ochranu obchodu, napríklad v prípade dumpingu a subvencií. Spoločná obchodná politika sa uskutočňuje v rámci zásad a cieľov vonkajšej činnosti Únie."*

smerovala k *„širokému a proaktívnemu prístupu“*[153] v otázke regulácie zahraničných investícií, ako vyplýva z mezinárodnych dohôd uzatvorených EÚ zasahujúcich aj do regulácie zahraničných investícií a to predovšetkým v liberalizíácii ich vstupu. Činnosť EÚ bola v tomto smere do veľkej mieri podporená doktrínou SDEÚ o implikovaných právomociach.

Simultáne teda existujú dva systémy regulácie zahraničných investícií: európska úprava založená na aktoch prijatých a medzinárodných dohodách uzatvorených EÚ a regulácia vyplývajúca zo siete bilaterálnych investičných dohôd uzatvorených medzi členskými a tretími štátmi.

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Akútnosť a problematičnost otázky je uznaná odbornou verejnosťou hneď z niekoľkých dôvodov. Za prvé, spoločná obchodná politika, ktorej súčasťou je regulácia priamych zahraničných ivnestícii, je, z praktického hľadiska, nejdôležitejšou zložkou externej politiky EÚ. Za druhé, EÚ je významným účastníkom medzinárodného obchodu a v rámci tohto postavenia uzatvára početné medzinárdné dohody (dvojstranné či multilaterálne) so strategickými partnermi, ktoré zahrňujú aj reguláciu zahraničných investícií. Za tretie, zmeny spôsobené Lisabonskou zmluvou zásadným spôsobom ovplyňujú rozdelenie právomocí medzi členskými štátmi a EÚ. Za štvrté, EÚ počíta s vytvorením novej politiky v danej oblasti, tj. spoločnej investičnej politiky, čo vyplýva aj z doposiaľ prijatých návrhov.

V súčasnosti prebiehajú diskusie ohľadom rozsahu regulácie EÚ v oblasti zahraničných investícií a to v dvoch základných úrovniach: za prvé, ktoré formy zahraničných investícií spadajú pod právomoc EÚ a za druhé, aký rozsah regulácie, tj. štandardov zaobchádzania a ochrany, má EÚ právomoc v budúcich investičných dohodách zjednávať.

Objavujú sa názory, že Lisabonská zmluva zostala *„na pol ceste k spoločnej investičnej politike“,*[154] reflektujúc fakt, že právomoc, tak ako je vymedzená v čl. 207 odst. 1 ZFEÚ, nebude stačiť na pokrytie celej regulácie zahraničných investícií

[153] BUNGENBERG, M., *The Division of Competences Between the EU and Its Member States in the Area of Investment Politics.* In HINDELANG, S., BUGENBERG, M., GRIEBEL, J. (Eds.), *European Yearbook of International Economic Law. Special Issue: International Investment Law and EU Law.* London: Springer, 2011, str. 29.
[154] SHAN, W., ZHANG, S.: The Treaty of Lisbon: Half Way toward a Common Investment Policy. In *The Euroepan Journal of International Law*, Vol. 22, no. 4, 2011, str. 1059 n..

v rozsahu, v akom je zaisťovaná súčasnými bilaterálnymi investičnými dohodami uzatvorenými medzi členskými a tretími štátmi.

Predkladaná práca túto otázku bližšie analyzuje s úmyslom dospieť k záverom o shode či rozdielnosti regulácie poskytovanej BITs a právom EÚ, resp. odpovede na otázku, či súčasná úprava práva EÚ umožňuje pokrytie regulácie zahraničných investícií v rozsahu poskytovanom BITs. Za týmto účelom sa práca sústreďuje na identifikovanie rozdielov medzi úpravou zahraničných investícií podľa BITs a podľa práva EÚ.

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Jadro predkladanej práce je členené do 7 kapitol.

Kapitola 2.1 (*„Current State of Affairs“*) stručne sumarizuje aktuálny stav – reflektuje plány Komisie vytvoriť spoločnú investičnú politiku a otázku, do akej mieri poskytuje Lisabonská zmluva základ pre jej realizáciu; úvádza hlavné dôvody aktuálnosti problematiky.

Kapitoly 2.2 až 2.7 sú venované samotnej úprave zahraničných investície právom EÚ a BITs a ich porovnaniu.

V kapitole 2.2 (*„EU Competence“*) je analyzovaná kompetencia EÚ v oblasti zahraničných investícií, pričom primárne sa sústreďuje na jej post-lisabonské vymedzenie a z neho plynúce dopady na budúce medzinárodné investičné dohody uzatvárané EÚ (*„international investment agreements“*, ďalej tiež len *„EU IIAs“*) v rámci spoločenej investičnej politiky.

Hlavná časť práce je venované jednotlivým prvkom mezinárodného investičného práva a ich úprave v oboch regulatórnych systémoch, tj. v práve EÚ a BITs.

Kapitola 2.3 (*„Defining Investment“*) skúma rozsah úpravy BITS a práva EÚ v súvislosti s definíciou zahraničnej investície v ich úpravách. Kapitola 2.4 pojednáva o podpore a vstupe zahraničných investícií. Kapitola 2.5 (*„Standards of Treatment and Protection“*) sa zameriava na štandardy zaobchádzania a rozsah poskytovanej ochrany po vstupe investície. Kapitola 2.6 (*„Expropriation“*) sa sústreďuje na problematiku vyvlastnenia. A kapitola 2.7 (*„Dispute Settlement“*) analyzuje prostriedky riešenia sporov dostupné investorom podľa BITs a práva EÚ.

Vyššie uvedené kapitoly sú zvlášť členené tak, aby bolo o každom prvku pojednané z pohľadu BITs a z pohľadu práva EÚ. V niektorých oblastiach je pozornosť venovaná tiež úprave obsiahnutej v už existujúcich EU IIAs a to predovšetkým z dôvodu, že naznačujú možnú úpravu v budúcich EU IIAs uzatváraných v rámci spoločnej investičnej politiky.

Závery dosiahnuté v jednotlivých kapitolách, tj. Právomoc EÚ (*„EU Competence"*), Definovanie investície (*„Defining Investment"*), Vstup a podpora (*„Admission and Promotion"*), Štandardy zaobchádzania a ochrana (*„Standards of Treatment and Protection"*), Vyvlastnenie (*„Expropriation"*) a Riešenie sporov (*„Dispute Settlement"*), sú zhrnuté v sumarizujúcich poznámkach na konci každej kapitoly, pričom tieto identifikujú hlavné rozdiely v úprave zahraničných ivnestícií podľa BITs a podľa práva EÚ a ich možné dopady na spoločnú investičnú politiku a budúce EU IIAs. Analýza obsiahnutá v predkladanej práci, samozrejme, nie je vyčerpávajúca.

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Právomoc EÚ. Východiskovým princípom zostáva, že právomoc EÚ je limitovaná, tj. založená na princípe prenosu právomocí, čo znamená, že EÚ môže konať len na základě Zmlúv. Právomoc, pre ktorú nie je v Zmluvách právny základ, zostáva v kompetenci členských štátov. Tento princíp je obsiahnutý v čl. 5 odst. 2 ZEÚ (*„Podľa zásady prenesenia právomocí Únia koná len v medziach právomocí, ktoré na ňu preniesli členské štáty v zmluvách na dosiahnutie cieľov v nich vymedzených. Právomoci, ktoré na Úniu neboli v zmluvách prenesené, zostávajú právomocami členských štátov.")* a uplatní sa na právomoc prijímať interné akty ako aj na právomoc uzatvárať medzinárodné dohody.

Po určení existencie právomoci EÚ v danej oblasti je potrebné určiť jej charakter, pričom druhy právomoci vymedzujú čl. 3 až čl. 6 ZFEÚ ako zdieľané kompetencie EÚ a členských štátov[155], výlučné kompetencie EÚ[156] a podporné, doplnkové a koordinačné kompetencie EÚ[157].

[155] Do tejto kategórie spadá väčšina pravomocí EÚ. Je založené na princípe rozhodovanie členských štátov v prípade, že rozhodnutie neprijme EÚ. Ak bolo rozhodnutie prijaté na európskej úrovni, členské štáty viac v rozsahu pokrytom európskou legislatívou konať nemôžu (pokiaľ opak výslovne nevyplýva z predpisu EÚ alebo sa nejedná o implementáciu predpisov EÚ). Akty a predpisy EÚ msia byť v súlade s princípom subsidiarity a proporcionality. Viz. čl. 4 ZFEÚ.

V oblasti priamych zahraničných investícií má EÚ v súlade s čl. 207 odst. 1 ZFEÚ (*„Spoločná obchodná politika vychádza z jednotných zásad, najmä vo vzťahu k úpravám colných sadzieb, uzavieraniu colných a obchodných dohôd týkajúcich sa obchodu s tovarom a službami, k obchodným aspektom duševného vlastníctva, priamym zahraničným investíciám, zjednocovaniu liberalizačných opatrení, vývoznej politike, ako aj k opatreniam na ochranu obchodu, napríklad v prípade dumpingu a subvencií. Spoločná obchodná politika sa uskutočňuje v rámci zásad a cieľov vonkajšej činnosti Únie.“)* a čl. 3 odst. 1 písm e) ZFEÚ: („*Únia má výlučnú právomoc v týchto oblastiach: ... e) spoločná obchodná politika.”* (relevantná časť)) výlučnú právomoc.

Pokiaľ ide o uzatvárenie medzinárodných dohôd rozsah výlučnej právomoci EÚ stanoví čl. 3 odst. 2 ZFEÚ: *„Únia má tiež výlučnú právomoc uzavrieť medzinárodnú dohodu, ak je jej uzavretie ustanovené v legislatívnom akte Únie alebo ak je jej uzavretie potrebné na to, aby Únia mohla vykonávať svoju vnútornú právomoc, alebo ak môžu byť uzavretím zmlúv dotknuté spoločné pravidlá alebo pozmenený rozsah ich pôsobnosti.“*

Výlučná právomoc EÚ v oblasti priamych zahraničných investícií, tak ako ju vymedzujú čl. 207 (1) ZFEÚ a čl. 3 dost. 2 ZFEÚ, je neurčitá v dvoch základných otázkach: za prvé, neurčitý je rozsah foriem zahraničných investícií, ktoré by EÚ teoreticky mala/mohla v rámci spoločnej investičnej politiky, resp. budúcich EU IIAs, regualovať a za druhé, neurčitý je rozsahu regulácie, tj. čo všetko ohľadom zahraničných investícií má EÚ právomoc regulovať - má sa obmedziť len reguláciu vstupu alebo má zahraničné investície regulovať aj po ich vstupu, napr. formou stanovenia štandardov zaobchádzania, príp. ochrany proti vyvlastneniu či formou poskytnutia práva diagonálnej arbitráže medzi investorom a hosťujúcim štátom?

Je možné uzavrieť, že, pokiaľ ide o formy investícií zahrnuté výlučnou kompetenciou, EÚ má výlučnú právomoc regulovať len priame zahraničné investície. Regulácia iných foriem zahraničných investícií spadá do kategórie zdieľaných právomocí a ich regulácia bude, pravebodobne, vyžadovať uzatváranie tzv. zmiešaných dohôd.

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[156] Princíp výlučných kompetencií EÚ vychádza z predpokladu, že v niektorých oblastiach je postup na úrovni EÚ efektívnejší než samostaný postup členských štátov. Viz. čl. 3 ZFEÚ.

[157] EÚ vykonáva lenpodpornú či koordinačnú činnosť, pričom rozhodovanie zostáva na úrovni členských štátov. Viz. čl. 5 a čl. 6 ZFEÚ.

Pokiaľ ide o otázku rozsahu následnej regulácie, tj. štandardov zaobchádzania a ochrany, čl. 207 odst. 1 ZFEÚ nestanoví žiadne limity. Otázka je interpretačne otvorená a názory sa rôznia: od reštriktívneho výkladu obmedzujúceho výlučnú právomoc EÚ len na liberalizáciu vstupu investícií, cez pripustenie regulácie s vylúčením úpravy otázok, pre ktoré nie je daná paralela v rámci vnútorných právomocí EÚ (čl. 207 odst. 6 ZFEÚ), tj. podľa niektorých názorov (napr. *Ceyssens*) je z výlučnej právomoci EÚ vylúčena úprava vyvlastnenie a absolútnych štandardov typu, až po široký výklad výlučnej právomoci, ktorý by, v súlade s princípom *effet utile*, umožnil EÚ uzatvárať medzinárodné dohody v oblasti priamych zahraničných investícií v rozsahu zaisťovanou BITs, tj. vrátane následnej regulácie štandardov zaobchádzania, ochrany proti vyvlastneniu a mechanizmov riešenie ivnestičných sporov aj formou diagonálných arbitráž priamo medzi investorom a hosťujúcim štátom.

Definícia investície. S relatívne dostatočnou určitosťou je možné stanoviť výlučnú právomoc EÚ len pre priame zahraničné investície. Pojem priamej zahraničnej investície je, v súlade so Stanoviskom súdu 1/2008, vhodné interpretovať v súlade s významom, ktorý je pojmu pripisovaný v medzinárondom práve, skôr než s významom, ktorý mu pripisuje právo EÚ, čo však v danom prípade nie je nijak rozhodujúce, vzhľadom na to, že pojem priamej zahraničnej investície sa v medzinárdnom ivnestičnom práve, rovnako ako aj v práve EÚ, v základných rysoch interpretuje ako účasť zahraničného investora na podniku v hosťujúcom štáte, pričom dôraz sa kladie na dlhodobosť vzťahu a existenciu vplyvu na chod podniku, ktorý sa určuje, napríklad, na základe (percentuálnej) veľkosti podielu zahraničného investora na podniku. Účelom týchto kritérií je odlíšiť priamu investíciu od portfóliovej investície, ktorá je, naopak charakterizovaná krátkodobosťou daného vzťahu, účelom ktorého nie je ovplyvňovať chod podniku (ako napríklad v prípadě krátkodobého nákupu akcií na burze).

Z čl. 207 odst. 1 ZFEÚ nevyplýva výlučná právomoc EÚ pre iné než vyššie uvedené formy investície, ako napríklad portfóliové investície, koncesie, práva duševného vlastníctva či smluvně založené práva, ktoré sú predmetom ochrany podľa BITS. To však neznamená, že EÚ nemá právomoc regulovať aj tieto prípadné iné formy zahrančiných investícií. K založeniu právomoci pre každú inú formu investície než priamu však bude potrebný príslušný právný základ.

Na tomto mieste je vhodné uviesť, že v rámci vnútorného trhu, tj. v rámci zahraničných investícií realizovaných medzi členskými štátmi navzájom, EÚ disponuje kompetenciami regulovať aj iné než priame zahraničné investície a to na základe ustanovení upravujúcich základné slobody, tj. predovšetkým voľný pohyb kapitálu (vo vzťahu k portfóliovým investíciám a niekotrým smluvným právam, ktoré sú považované za investíciu podľa BITs), slobodu usadzovania (predovšetkým vo vzťahu k regulácii investície po vstupe) a slobodu poskytovať služby (vo vzťahu k smluvám uzatvoreným medzi investorom a štátom v obalsti poskytovania služieb a vo vzťahu ku koncesiám).

Príslušné ustanovenia regulujúce vnútorný trh však nespokytujú priamy základ pre kompetenciu EÚ uzatvárať v daných prípadoch medzinárodné dohody upravujúce predmetné aspekty vo vzťahu k občanom, resp. investorom, z tretích zemí.

Judikatúra Súdneho dvora EÚ vymedzila okolnosti, za ktorých vzniká tzv. implikovaná právomoc EÚ uzatvárať v určitej oblasti medzinárodné dohody aj v prípade, že tak nie je výslovne stanovené v Zmluvách. Do Lisabonskej zmluvy vstupu v účinnosť bola doktrína implikovaných právomocí založená výlučne na judikatúre.

Lisabonská zmluva sa pokúsila závery judikatúry kodifikovať a to konkrétne v čl. 216 odst. 1 ZFEÚ pre implikovanú právomoc uzatvárať medzinárodné dohody obecně a v čl. 3 odst. 2 ZFEÚ pre výlučnú implikovanú kompetenciu.

Výlučná implikovaná externá kompetencia EÚ je podľa čl. 3 odst. 2 ZFEÚ daná v prípade, že:

I. *„uzavretie medzinárodnej dohody je ustanovené v legislatívnom akte Únie, alebo*

II. *uzavretie medzinárodnej dohody je potrebné na to, aby Únia mohla vykonávať svoju vnútornú právomoc, alebo*

III. *uzavretím zmlúv môžu byť dotknuté spoločné pravidlá, alebo pozmenený rozsah ich pôsobnosti*.“

Implikovaná právomoc EÚ (v tomto prípadě zdieľanej povahy) je podľa čl. 216 odst. 1 ZFEÚ daná v prípade, že:

I. *„to ustanovujú zmluvy, alebo*

II. je uzavretie dohody potrebné na dosiahnutie jedného z cieľov stanovených zmluvami v rámci politík Únie, alebo

III. je uzavretie dohody ustanovené v právne záväznom akte Únie, alebo

IV. sa uzavretie dohody môže dotknúť spoločných pravidiel alebo pozmeniť ich pôsobnosť.“

Výlučnú kompetenciu EÚ pri aplikácií vyššie uvedených pravidiel na úpravu základných slobôd v rámci vnútorného trhu nie je možné dovodiť nakoľko uzavretie medzinárodnej dohody nie je predpokladané Zmluvami ani iným legislatívnym aktom EÚ a taktiež nie je potrebné k tomu, aby EÚ mohla vykonávať vnútornú kompetenciu a uzavretím zmlúv by taktiež neboli dotknuté spoločné pravidlá, príp. pozmenený ich rozsah.

Pri porovnaní čl. 216 odst. 1 ZFEÚ a čl. 3 odst. 2 ZFEÚ je možné dôjsť k záveru, že EÚ môže uzavrieť dohodu potrebnú na dosiahnutie jedného z cieľov stanovených zmluvami v rámci politík EÚ, avšak vzhľadom na to, že toto ustanovenie čl. 216 ZFEÚ nemá ekvivalent v čl. 3 odst. 2 ZFEÚ, nie je možné v danom prípade dovodiť výlučnú externú implikovanú kompetenciu EÚ. Tj. v prípade, že je uzavretie medzinárodnej dohody potrebné na dosiahnutie cieľa stanoveného zmluvami pro niektorú z politík, má EÚ právomoc dohodu uzavrieť; táto právomoc však bude zdieľaná.

V tomto prípade však opäť nie je možné učiniť jednoznačný záver, že prijatie dohody, ktorá by okrem priamych zahraničných ivnestícií zahŕňala aj iné formy bežne pokryté BITs, je potrebná na dosiahnutie cieľa stanoveného Zmluvami pro spoločnú obchodnú politiku. Ciele spoločnej obchodnej politiky sú vymedzené v čl. 206 ZFEÚ a v čl. 21 ZEÚ.

S vedomím neistoty ohľadom učiněných záverov, je možné konštatovať, že EÚ je v prípadných budúcich EU IIAs nadaná právomocou regulovať aj iné formy zahraničných investícií než priame. Bude tak činiť síce na základe čl. 216 odst. 1 ZFEÚ ale zároveň mimo čl. 3 odst. 2 ZFEÚ, tj. jej právomoc je daná, avšak bude zdieľaná. V prípade, že sa EÚ rozhodne okrem priamych regulaovať aj iné formy zahraničných ivnestícií bude tak činiť v rámci zdieľanej kompetencie a teda formou zmiešaných dohôd.

Vstup a podpora zahraničných investícií. BITs sa primárne nesústreďujú na vstup na podporu zahraničných investícií. Ich releventné ustanovenia sa obmedzujú na záväzok vytvárať priaznivé podmienky pre vstup zahraničných ivnestícií a pripúšťať investícií v súlade s vnútroštátnymi právnymi predpismi, tj. podmienky vstupu a prípadné obmedzenia či podpory sú upravené predovšetkým v národnej legislatíve. Štáty si tak ponechali širokú mieru volnosti regulácie (ktorá však môže byť obmedzená inými mezinárodnými závazkmi, ktoré štáty prevezmú, napr. obmedzeniami vyplývajúcimi z práva EÚ).

Na rozdiel od BITs, právo EÚ sa tradične zameriavalo predovšetkým na liberalizáciu investícií, tj. na odstráňovanie prekážok vstupu na trh hosťujúceho štátu. Právov EÚ však v tomto smere operuje s iným pojmovým aparátom než medzinárodné právo. Liberalizácia invesícií v rámci EÚ prebieha na základe princípu nediskriminácie. Princíp nediskriminácie je predovšetkým prostriedkom tvorby a realizácie vnútorného trhu EÚ. V tomto prípade je z hľadiska úpravy vstupu a podpory zahraničných investícií vhodné zamerať sa na už uzavreté EU IIAs. Pravidlá základných slobôd vnútorného trhu založené na princípe nediskriminácie sú v EU IIAs rozšírované na občanov, resp. investorov a investície z tretích štátov, a to v rôzne modifikovanom rozsahu v závislosti na miere plánovanej integrácie/kooperácie medzi EÚ a príslušnou zmluvnou stranou.

Štandardy zaobchádzania. Štandardy zaobchádzania predstavujú reguláciu zahraničných investící primárne po ich vstupe na územie hosťujúceho štátu, tj. sústreďujú sa na následný vzťah (tj. vzťah po vstupe či zriadení ivnestície) hosťujúceho štátu k zahraničnej investícii po dobu jej existencie. BITs tento vzťah upravujú pomocou relatívnych a absolútnych štandardov zaobchádzania so zahraničnými investíciami. Relatívne štndardy sú založené na zabezpečení nediskriminačnej ochrany zahraničných investícií vo vzťahu k inými zahraničnými investorom (tzv. doložka najvyšších výhod (*„most-favoured-nation clause“* („*MFN*“))), rovnako ako aj vo vzťahu k domácim investorom (tzv. doložka národného zaobchdázania (*„national treatment clause“* (*„NT“*))). Aboslútne štandardy, tj. napríklad, princíp riadneho a spravodlivého zaobchádzania (*„fair and equittable treatment“* (*„FET“*), princíp plnej ochrany a bezpečnosti (*„principle of full protection and security“*), zahraničným investorom zaručujú určitý základný štandard aplikovateľný na všetkých investorov bez ohľadu na štát ich pôvodu.

Úprava štandardov zaobchádzania je jadrom BITs, a zároveň jedným z hlavných rozdielov medzi úpravou zahraničných investícií podľa BITs a podľa práva EÚ. Právo EÚ zahraničným investíciám, resp. investorom žiaden základný štandard zaobchádzania, resp. ochrany, neposkytuje.

Otázkou zostáva, či v rámci spoločnej investičnej politiky, a teda v rámci budúcich EU IIAs, má byť určitý základný štandard poskytnutý, a ak áno, tak aký. Vznesené argumenty sú najmä koncepčného charakteru a riešia mieru zainteresovanosti EÚ na regulácii a ochrane zahraničných investícií po ich vstupe, resp. založení.

Argumentačne je možné podložiť obmedzenie spoločnej investičnej politiky len na obchodné aspekty regulácie zahraničných investícií, tj. len na vnútornú a vonkajšiu úpravu podmienok vstupu investície na vnútorný trh EÚ založenú predovšetkým na princípe nediskriminácie. Regulácia obmedzená na obchodné aspekty zahraničných investícií by tak neupravovala následnú reguláciu zahraničných investícií, tj. reguláciu po vstupu, resp. vzniku investície, ani jej ochranu, či už formu ochrany proti vyvlastneniu a zakotvením princípov kompenzácie, alebo priznáním práva investorovi obrátiť sa s nárokom priamo proti hosťujúcemu štátu prostredníctvom investičnej arbitráže. V prospech tohoto reštriktívneho výkladu je možné argumentovať predovšetkým systematickým zaradením kompetencie EÚ v oblasti zahraničných investícií do spoločnej obchodnej politiky, ktorá sa tradične zameriava na liberalizáciu vstupu na trhu bez následnej regulácie, tj. bez špeciálnej úpravy vzťahu prijímjúceho štátu k tovaru (v rámci tradičnej obchodnej politiky) po jeho prepustení do vnútorného trhu. Avšak, samotná spoločná obchodná politika prechádza koncepčnou zmenou a rozširuje sa i o úpravu, ktorá prekračuje tradičné limity liberalizácie obchodu s tovarom (napríklad rozšírenie spoločnej obchodnej politiky o obchdoné aspekty duševného vlastníctva či obchod so službami). Taktiež na pôde WTO, ktorá je zameraná na obchodnú politiku, došlo, síce k neúspešnému, pokusu o medzinárodnú dohodu v oblasti zahraničných ivnestícií. Naviac, následná regulácia taktiež može ovplyvniť rozhodnutie potenciálneho investora investovať v určitom štáte, tj. vyšší štandard ochrany a vyššia miera právnej istoty môžu investorov motivovať k realizácii investície práve v rámci ústretového právneho prostredia. Hranica medzi liberalizáciou vstupu investícií a ich následnou reguláciou nemusí byť vždy striktne rozlíšená.

Rozsah kompetencie EÚ podľa čl. 207 ZFEÚ je tiež možné vymedziť na základe tzv. paralelizačnej doložky obsiahnutej v čl. 207 odst. 6 ZFEÚ, ktorá stanoví, že *„výkonom právomocí prenesených týmto článkom v oblasti obchodnej politiky nie je dotknuté rozdelenie právomocí medzi Úniou a členskými štátmi a tento výkon nepovedie k harmonizácii zákonov alebo iných právnych predpisov členských štátov, pokiaľ zmluvy takúto harmonizáciu vylučujú.“* Argumentácia vychádza z predpokladu, že čl. 207 odst. 6 zakladá paralelu medzi vnútornou a vonkajšou právomocou EÚ, tj. vylučuje kompetenciu EÚ regulovať v rámci obchdonej politiky ibalsti, ktoré sú zmluvami či inými aktami EÚ vyňaté z pôsobnosti EÚ. Na základe tejto klauzule je nietkorými autormi dovodzované vylúčenie právomoci EÚ regulovať v rámci spoločnej obchdonej politiky ochranu proti vylvastneniu či úpravu štandardu riadneho a spravodlivého zaobchádzania, ktoré, je argumentované, nemajú ekvivalent v rámci vnútorných kompetencií EÚ.

Extenzívny výklad ustanovenia čl. 207 odst. 1 ZFEÚ smeruje k založeniu komeptencie EÚ, ktorá by ju oprávňovala uzatvárať dohody v rozsahu dohôd o zónach voľného obchodu uzatváraných USA. Regulácia zahraničných ivnestícií v rámci spoločnej investičnej politiky by následne zahŕňala úpravu vstupu investície, štandardov zaobchádzania s investíciou pred aj po vstupe na trh, ochranu investície vrátane ochrany proti vyvlastneniu a mechanizmu riešenia sporov na diagonálnej úrovni investor-štát.

Do akej mieri bude EÚ zaručovať vyššie uvedené nároky investora je otázne. Čl. 207 odst. 1 ZFEÚ žiadne limity na rozsah následnej regulácie a ochrany nestanoví.

Vyššie uvedené koncepčné otázky nie sú jediným nedoriešeným aspektom otázky rozsahu regulácie zahraničných investícií podľa čl. 207 odst. 1. ZFEÚ.

Problémom je tiež nejednoznačnosť vymedzenia FET. Princíp je v medzinárodnom práve vykladaný široko. Často sa interpretuje v súvislosti s princípom plnej ochrany a bezpečnosti, pričomž hlavný rozdiel spočíva v orientácii neskôr uvedeného princípu na fyzickú ochranu investície. FET zahŕňa tiež ochranu proti odmietnutiu poskytnutiu spravodlivosti a zaistenie spravodlivého procesu (od reštriktívneho výkladu obmedzujúceho FET na odmietnutie prístupu k spravodlivosti až po extenzívny výklad zahrňujúci nesprávny postup štátu prostredníctvom

ktorejkoľvek z jeho zložiek). Obsahom FET môže byť aj požiadavka na transparentnosť, ochranu legitímnych očakávaní či dobrej viery investora.

Vyvlastnenie. Ochrana proti vyvlastneniu je tradičným prvkom ochrany poskytovanej BITs. Predovšetkým regulatórne vyvlastnenie je jedným z investormi najčastejšie využívaných ustanovení. K odňatiu majetku na základe regulačných opatrení dochádza v rámci regulačnej právomoci štátov, napríklad, v daňovej oblasti či v oblasti ochrany životného prostredia, pričom k poklesu hodnoty investície dochádza bez toho, že by sa investorovi znemožnil výkon jeho vlastníckych práv.[158] Okrem regulatórnej expropriácie teória ďalej rozlišuje priame odňatie majetku, ktoré poskytuje prípady znárodnenia majetku investorov a spočíva v odňatí vlastnického titulu alebo fyzického odňatia majetku a nepriame odňatie majetku, tzv. „plíživé vyvlastnenie“, keď dochádza k postupnému obmedzovaniu vlastnických práv investora v konečnom dôsledku vedúceho až k strate vlastníckeho titulu.

V otázka vyvlastnenia je prístup EÚ zdržanlivý a to predovšetkým vo vzťahu k regulatórnemu vyvlastneniu. Jedná se predovšetkým o problematiku zachovania autonómie politík EÚ v oblastiach zdravia, bezpečnosti či životného prostredia, avzhľadom na to, že regulatórna činnosť EÚ v daných oblastiach by v určitých prípadoch mohla naplniť znaky vyvlastnenia na základe regulačných opatrení.

Riešenie sporov. BITs investorom poskytujú okrem hmotnoprávných nárokov tiež nároky procesné, a to predovšetkým právo investora riešiť prípadný spor vyplývajúci z porušenia BITs formou arbitráže proti hosťujúcemu štátu. Investor má vo väčšine prípadov na výber od využitia miestnych súdov hosťujúceho štátu až po predloženiu sporu pred Stredisko pre riešenie sporov z medzinárodných investícií (*„International Centre for Settlement of Investment Disputes“,* (*„ICSID“*)).

Z pohľadu práva EÚ predstavuej práve zavedenie možnosti priameho uplatnenia nároku investora voči hosťujúcemu štátu najkomplexnejšiu otázku. Subjetivita EÚ je novinkou Lisabonskej zmluvy a sama EÚ priznáva, že na poli riešenie sporov je novým hráčom.

Otvorená zostáva otázka voľby vhodného fóra. ICSID, pokiaľ nedôjde k zmene Washingtonskej dohody, je otvorený len štátom – EÚ, ako regionálna

[158] Viz. tiež napr. BRONWLIE, I., *Public International Law*. Oxford: Oxford University Press, 2003; NEWCOMBE, A.: *The Boundaries of Regulatory Expropriation in International Law*. In *ICSID Review*, 2005.

integračná ekonomická organizácia, k dohode pristupiť nemôže. Čo sa týka ostatných arbitrážnych fór je otázna ich vhodnosť pre riešenie investičných sporov predovšetkým v otázkach publicity.

Nejasný je tiež model mechanizmu riešenia prípadných sporov. EÚ má na výber medzi americkým modelom detailnej úpravy a európskym, regulačne úspornejším modelom. Pravdou zostáva, že na rozdiel od európskych BITs, americká modelová BITs naviact ošetruje tiež účasť nesporných strán, transparentnosť, verejné jednania či podania *amicus curiae*, tj. úpravy niektorých aspektov medzinárodných arbitráží, ktoré sa zvlášť v oblasti investičných sporov, javia ako žiadúce.

Doposiaľ neuzavretá je tiež problematika medzinárodnej zodpovednosti EÚ zahrňujúca, za prvé, problematiku pričítateľnosti konania EÚ a členským štátom a za druhé, otázku rozdelenia zodpovednosti medzi EÚ a členské štáty. Východiskom je čl. 47 ZEÚ, ktorý stanoví, že *„Únia má právnu subjektivitu"*, tj. od účinnosti Lisabonskej zmluvy bola štruktúra EÚ zjednotená do samostatného právneho subjetku.

Pri určovaní zodpovednosti EÚ v konrétnych otázkach je však naďalej nutné rešpektovať delenie komeptencií na výlučné a zdieľané v súlade s čl. 3 až čl. 6 ZFEÚ. V prípade spoločnej investičnej politiky a budúcich EU IIAs, ktoré by boli, ako je uvedené vyššie, pravdepodobne zmiešaného charakteru, by bolo potrebné v každom jednotlivom prípade skúmať, či sa jedná o protiprávny akt pričítateľný EÚ alebo členskému štátu. Pri interpretácii je možné využiť Návrh článkov o zodpovednosti medzinárodných organizácií pripravených v rámci OSN v rokoch 2002-2011.[159]

[159] Návrh čl. 3 stanoví, že každý medzinárodne protiprávny akt medzinárodnej orgánizácie so sebou prináša medzinárodnú zodpovednosť medzinárodnej organizácie, pričom protiprávny akt je vymedzený návrhovaným čl. 4, ktorý stanoví, že akt spočíva v konini alebo nekonaní za predpokladu, že je pričítateľný medzinárodnej organizácii podľa medzinárodného práva a zároveň je porušením medzinárodného závazku organizácie. Pričítateľnosť aktu rieši navrhovaný čl. 5 odst. 1, ktorý stanoví, že konanie orgánu alebo zmocnenca medzinárodnej organizácie pri výkone jeho fukncií je pričítateľné tejto organizácii podľa mezinárodného práva bez ohľadu na pozíciu, ktorú tento orgánu voči organizácii zastáva. Pričitateľnosť jej narvhovanými článkami podmienenáefektívnou kontrolu predmetného konania emdzinárodnou organizáciou (čl. 6), s tým, že za konanie pričitateľné organizácie je možné považovať konanie za rpedpokladu a v rozsahu, že organizácia ho uzná sa svoj, tj. organizácia je zodpovedná za protiprávne konanie v príapde, že akceptovala svoju zodpovednosť a toto primälo poškodenú strnu spoliehať sa na takto uznanú zodpovednosť medzinárodnej organizácie (čl. 61). Otázka núteného protiprávneho konania členských štátov je riešneá v čl. 16 a čl. 60 a stanoví, že zodpovednosť organizácie zostáva zachovaná v prípade, že zmocňuje alobe odporúča členským štátom výkon protiprávneho aktu a členský stat jedná na základe tohto zmoznenia či odoporučenia, zároveň sa však nemože dovolávať kompetencie organizácie, aby sa vyhovaol plneniu iných pre neho z neho z medzinárodného práva vyplývajúcich závazkov.

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Pri formovaní spoločnej investičnej politiky obsahu budúcich EU IIAS je nutné počítať s tým, že, po prvé, niektoré otázky sú právom EÚ vymedzené dostatočne určite (napríklad, stanovenie výlučnej právomoci nad priamymi zahraničnými investíciami či výlučnej kompetencie EÚ regulovať liberalizáciu, tj. vstup investícií na vnútorný trh EÚ, priamch investícií); po druhé, v niekoľkých zásadných otázkach medzinárodnej regulácie zahraničných ivnesticií nebolo doposiaľ prijaté konečné stanovisko a jeho vymedzenie často závisí na bližšom vymedzení cieľov spoločnej obchodnej politiky EÚ vo vzťahu k zahraničným investíciám (napríklad otázka regulácie následných štandardov zaobchádzania, vyvlastnenia či zakotvenie priameho uplatnenia nárokov investorov voči EÚ, resp hostiteľskému štátu); po tretie, ja potrebné brať v úvahu nedodriešenosť niektorých súvisiacich otázok, ako napríklad medzinárodnej zodpovednosti EÚ, či výber fór pre prípadné riešenie investičných sporov.

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Otázka vhodného nastavenia spoločnej investičnej politiky úzko súvisí s ústrednými princípmi právomocí EÚ – s princípom subsidiarity a proporcionality.

Princíp subsiadirity vymedzuje právomoci EÚ z pohľadu členských štátov. Princíp proporcionality upravuje vzťah pravomocí EÚ k cieľom jej činností, tak ako ich vymedzejú Zmluvy.

Princíp subsidiarity, vymedzený v čl. 5 odst. 3 ZEÚ stanoví: *„Podľa zásady subsidiarity koná Únia v oblastiach, ktoré nepatria do jej výlučnej právomoci, len v takom rozsahu a vtedy, ak ciele zamýšľané touto činnosťou nemôžu členské štáty uspokojivo dosiahnuť na ústrednej úrovni alebo na regionálnej a miestnej úrovni, a z dôvodov rozsahu alebo účinkov navrhovanej činnosti ich možno lepšie dosiahnuť na úrovni Únie.“*

Princíp proporcionality je vyjadrený v čl. 5 odst 4 ZEÚ týmto spôsobom: *„Podľa zásady proporcionality neprekračuje obsah a forma činnosti Únie rámec toho, čo je nevyhnutné na dosiahnutie cieľov zmlúv.“*

Základné otázky, ktoré je potrebné zodpovedať v tomto ohľade vo vzťahu k regulácii zahraničných ivnestícií znejú: Je vhodnejšie upravovať zahraničné investície na úrovni EÚ alebo na úrovni jednotlivých členských štátov? Aký (minimálny) rozsah

právmoci EÚ v oblasti zahraničných investícií bude stačiť na efektívnu realizáciu cieľov spoločnej obchodnej, reps. investičnej politiky?

Uvedené zásady sa uplatnania na akúkoľvek činnosť EÚ. Touto prizmou je teda vhodné posudzovať taktiež možnosti a limity kompetencie EÚ v oblasti zahraničných investícií.

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Problematika spoločnej európskej investičnej politiky a otázka prenosu primárnej regulatórnej zodpovednosti v danej oblasti z členských štátov na úroveň EÚ je vysoko komplexná.

Naviac, vzhľadom na to, že sa jedná o politiku, množstvo otázok závisí práve na definovaní jej jasných cieľov, ktoré následne majú, predovšetkým v práve EÚ, tiež právny dosah.

Okrem toho, spoločná európska investičná politika sa stále nachádza v štádiu formovania. Pravdou zostáva, že množstvo súvisiacich problematík je závislých na doriešení čiastkových otázok, ktoré vyžadujú podrobné a detailné spracovanie príslušných okruhov a následnú diskusiu.

Vyššie uvedené zároveň predstavuje hlavné problémy pri koncipovaní predkladanej práce.

6. ABSTRACT

6.1 Abstract (SK)

V súčastnosti prebieha v rámci Európskej únie záasdná zmena v oblasti regulácie zahraničných investícií spočívajúca v presune (niektorých) kompetencií v danej obalsti z členských štátov na Európsku úniu, a to ako súčasť širiš iniciatívy s konečným cieľom vytvoriť spoločnú európsku investičnú politiku, ktorá, je arguemntované, môže eventuálne nahradiť systém bilaterálnych ivnestičných dohôd uzavretých medzi členskými a tretími štátmi.

Od vstupu Lisabonskej zmluvy v účinnosť je Európska únia výlučne kompetentná regulovať priame zahraničné investície vo vzťahu k tretím štátom a to na základe vloženia pojmu „priamych zahraničných investícií“ do znenia čl. 207 odst. 1 Zmluvy o fungovaní Euróspekj únie upravujúceho spoločnú obchodnú politiku, v ktorej, v súlade s čl. 3 odst. 1 písm. e), má Európska únie výlučnú právomoc.

Aj keď znenie článku vyzerá na prvý pohľad jasne, existuje niekoľko otázok, predovšetkým vo veci rozsahu novej výlučnej kompetencie Európskej únie, ktoré doposiaľ neboli vyriešené.

Po prvé, problematika rozsahu foriem zahraničných investícií, ktoré by mali byť regulované Európskou úniou v rámci novej kompetencie, je nejasná. Boli vznesené argumenty, že výlučná kompetencia sa vzťahuje len na priame zahraničné investície, zatiaľ čo iné formy, v prípade, že by mali byť regulované na spoločnej európskej úrovni, by spadali pod zdieľadnú kompetenciu. To by v konečnom dôsledku znamenalo, že budúce investičné dohody uzatvorené Európskou úniou, ak by mali poskytovať komplexnú ochranu v rozsahu bilateránych investičných dohôd, by museli byť uzatvárané ako zmiešané dohody.

Po druhé, rozsah následnej regulácie, tj. regulácie po vstupu, resp. vzniku investície, je nejasný. Interpretácie sa rôznia a pokrávajú škálu počínajúc prísne reštriktívnymi, limitujúcimi právomoc Únie na reguláciu vstupu na trh a liberalizáciu investícií. Interpretácia štedrejšie voči Únii pripúšťa, že výlučná kompetencia sa môže vzťahovať aj na následnú reguláciu, ktorá je však limitovaná tzv. „paralelizačnou klauzulou“, čo znamená, že vonkajšia činnosť Únie je prípustná len v prípade, že paralelne s ňou existuje zhodná vnútorná právomoc. Aplikovanie klazule na

predmetnú oblasť by znamenalo, ako pokračuje argumentácia, že ochrana proti vyvlastneniu a úprava riadneho a spravodlivého zaobchdádzania by bola vylúčená.

Založená primárne na princípe *effet utile*, je zastávaná široká komplexná právomoc Únie, ktorá by umožňovala reguláciu zahrančných investícií v rozsahu poskytovanou bialterálnymi investičnými dohodami, tj. v duchu tejto interpretácie by kompetencia Únie zahŕňala reguláciu pred aj po vstupe, resp. založení, investície, štandardy zaobchádzania, ochranu proti vyvlastneniu a mechanizmus riešenia sporov zakotvujúci právo využiť investičnú arbitráž na úrovni investor – hosťujúci štát.

Predkladaná práca porovnáva oba regulatórne systémy (tj. úpravu bilateralných investičných dohôd ako aj európskeho práva) so zámerom identifikovať rozdiely a, prípadne, dospieť k záveru v otázke, či nová kompetencia Únie má vôbec potenciál nahradiť súčasnú sieť bilaterálnych ivnestičných dohôd uzavretých medzi členskými a tretími štátmi.

6.2 Abstract (ENG)

Interaction between Bilateral Investment Treaties and EU law

A major change in the regulation of foreign investments is underway in the European Union involving a transfer of (certain) competences within the field from Member States to the EU, all being a part of a wider initiative with the ultimate goal of establishing a common European investment policy, which, it is argued, might eventually replace the network of bilateral investment treaties concluded between Member States and third countries.

Starting with the entry into force of the Lisbon Treaty, the EU is exclusively competent to regulate extra-EU foreign direct investments since the term "foreign direct investment" was introduced in Article 207 (1) TFEU dealing with the common commercial policy, in which, in accordance with Article 3 (1) (e) TFEU, the EU shall have exclusive competence.

Even though the wording is seemingly simple, certain issues, especially concerning the scope of the new EU competence, have been raised and are still not settled.

First, the issue of the scope of forms of foreign investments which are to be covered by the EU regulation is unclear. It has been argued that the exclusive competence extends only over direct investments, while other forms, if they are to be covered, would fall under shared competence. This would result in complex future EU IIAs having to be concluded in the form of mixed agreements.

Second, the scope of post-entry regulation is unclear. The interpretation ranges from a very restrictive one, limiting the new competence to the regulation of market access and liberalization. A more generous approach admits that the competence might extend even over post-entry regulation, which would, however, be limited by the so called "parallelism clause", meaning that external action of the EU is permissible only in cases when there is a corresponding internal competence. Applied to the field of foreign investments, protection against expropriation and coverage of

fair and equitable treatment, as it is argued, is ruled out. Based primarily on *effet utile* principle, a very comprehensive competence is advocated, which would in fact covered the entire regulation of foreign investments as it provided for by bilateral investment treaties, i.e. the competence, under the mentioned interpretation, would cover both pre- and post-entry regulation, standards of treatment, protection against expropriation as well as a dispute resolution mechanism providing for investor-state arbitration.

The present thesis compares and contrasts both regulatory systems (i.e. the regulation provided for by bilateral investment treaties and EU law) in an attempt to identify the differences and, ultimately, draw a conclusion on whether the new EU competence actually has the potentially to replace the current network of bilateral treaties concluded between Member States and third countries.

7. KEYWORDS

the common European investment policy – bilateral investment treaties

společná evropská investiční politika – bilaterální investiční dohody