BRINGING INVESTMENTS UNDER THE EU UMBRELLA

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ABSTRACT

With the recent developments in the field of international economic and trade law, the study of international investment arbitration has emerged as one of the most important and contemporary issues which has gained immense importance over time. The Treaty of Lisbon, 2009, altogether gave a different meaning to the idea and concept to the word 'Investment'. Researchers came up with several interpretations regarding the Unions' competence on Foreign Direct Investments. But as of now none have been a settled principle of law. The European Union since the inception of the Treaty of Lisbon, 2009 has somewhat emerged as a dominant figure in the international investment regime. One of the prime objectives of the Union is to enact legislation which tends towards common policies on trade, investments and regional development of the member states. This key feature of the Union has also been instrumental in its 2004 enlargement. But the question which arises here is whether the Union is usurping the powers of its member states to regulate matters relating to investments and especially to foreign direct investments. This paper will highlight and will focus on various aspects of international investments with special reference to the European Union. The Treaty of Lisbon, 2009 which amended the Treaty on the functioning of the European Union (TFEU) has now given the Union exclusive competence over matters relating to foreign direct investment. The EU has also expressed its concerns over its member states to terminate all its existing intra-EU Bilateral Investment Treatises (BIT). This has led to a plethora of disputes regarding the jurisdiction of the European Court of Justice over various arbitral tribunals that were previously agreed upon to have jurisdiction over such disputes by way of Bilateral Investment Treatises (BIT). Here the Vienna Convention on Law of Treatises, being the mother treaty of all international conventions and statutes also plays a crucial role in interpreting foreign direct investment with regard to the power vested with the European Union. This paper will highlight all such issues where there is a direct conflict with the provisions of the Vienna Convention on Law of Treatises and the existing intra-EU

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Bilateral Investment Treatises. The Treaty of Lisbon, 2009 has now even questioned the very existence of intra-EU BITs and has raised a several questions on the survival clauses of such Bilateral Investment Treatises. This paper will incorporate the overgrowing concerns of jurisdiction and various aspects of international investment disputes which have arisen due to this constant tussle between arbitral tribunals and the European Court of Justice (ECJ). This paper will also include as to how an amicable solution can be achieved so as to avoid this conflict.

INTRODUCTION

INTERNATIONAL INVESTMENT ARBITRATION

International Arbitration has now become one of the most effective methods of Dispute Resolution thereby relaxing the formalities and complexities of the domestic legal system. By way of International Arbitration the parties enter into a contract by which they submit their dispute to a mutually elected one or more arbitrators selected by or on behalf of the parties and applying adjudicatory procedures accordingly. It saves one from the clutches of the never-ending dilatory process of litigation and the various strict and conservative practises attached to it. International Arbitration functions under two heads, i.e. Commercial Arbitration and Investment Arbitration.

Investment arbitration, although it is arbitration, differs from commercial arbitration in several fundamental ways. In Commercial Arbitration, the arbitration which commences is based on an arbitration agreement, whereas on the other hand investment arbitration may be based either on (a) an investment treaty, either multi- or bilateral (BIT), (b) the host State's national investment law, which often provides for protection of foreign investors or (c) in certain circumstances, an investment agreement. Moreover the parties involved in an investment arbitration is a sovereign state, i.e. *Host State* and the individual foreign investor from the other contracting state. This therefore marks a very distinct feature of investment arbitrations since an individual can directly proceed against the Host State, without approaching its own State to sue on its behalf.[2]

In commercial arbitration, the arbitral tribunal judges the contract between the parties, i.e. its conclusion, performance and termination, whereas in investment arbitration, the arbitral

[2] Malhotra, Indu, *O.P Malhotra's The Law and Practice of Arbitration and Conciliation*, Third Edn, Thomson Reuters, New Delhi, Pg. 1978.

tribunal makes findings on the host State's behaviour towards a foreign investor. Commercial Arbitration is more contractual in nature as the tribunal adjudicates upon the contract between the parties. In investment arbitration since it is generally based upon an Investment Treaty, the tribunals interpret the Treaty in order to ascertain whether the investor has been accorded due protection as per the norms set out in the Treaty which are formulated and signed by the two countries in accordance with the principles of International Law.

One of the most intriguing features of investment arbitration is that the scope of jurisdictional conflicts is much wider and frequent in contrast to commercial arbitration. The scope of jurisdiction in investment arbitration is much wider than that of commercial arbitration.

GENERAL CONCEPTS RELATING TO BILATERAL INVESTMENT TREATISES

Bilateral investment treaties (BITs) are international agreements between countries that provide companies and individuals with special rights and legal protections when they invest in the host State. It seeks to provide a stable investment environment by providing certain protections to investors against any arbitrary action by the Host State, which may diminish or reduce the value of the investment. BITs lay down the terms and conditions for investment in one country by private companies and individuals of another country. BITs are typically created to promote investment in the host State so as to strengthen the Host States' Economy and at the same time yields profit for the investors. With respect to substantive protection, most treatises contain guarantees relating to expropriation, fair and equitable treatment, and also a most favoured nation clause. These protections contained in the BITs are in different numbered Clauses.

There are over 2,000 BITs in existence today, affecting numerous countries and investors around the globe.

THE INCEPTION OF TREATY OF LISBON, 2009

TEC AND TFEU- THE LAW OF THE EUROPEAN UNION

The Treaty of Rome, which was originally known as the Treaty establishing the *European Economic Community* has been amended by successive treaties significantly changing its content. The Treaty of Maastricht, 1992 established the European Union with the EEC becoming one of its three pillars, the European Community. Hence, the treaty was renamed

the Treaty establishing the European Community (TEC) which is one of the most important governing laws of the European Union.

Since the inception of the Treaty of Lisbon, the EC ceased to exist as a legal entity separate from the EU. This led to the treaty being amended and renamed as the Treaty on the Functioning of the European Union (TFEU)[3].

SPECIFIC PROVISIONS OF TEC AND TFEU

The Lisbon Treaty has managed to include 'foreign direct investment' in the 'common commercial policy' of the EC Treaty, which is now named the Treaty on the Functioning of the European Union (TFEU). The most directly related provisions are contained in Articles 206 and 207 TFEU. They are as follows:

Article 206

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.

Article 207

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.

The Treaty of Lisbon finally entered into force on 1st December 2009, thereby effectuating a number of significant changes in the constitutional structure of the EU. Among them the most important was the inclusion of foreign direct investment (FDI) under the Common Commercial Policy (CCP) of the European Union. It seems to be one of the most significant changes but is least discussed as of now. Indeed, when preparing the European Constitution,

[3] *Presidency Conclusions Brussels European Council 21/22 June 2007*, Accessed from http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/94932.pdf, on 5th January, 2016.

the predecessor of the Lisbon Treaty, no discussion had been held on the extension of the CCP to investment.

Before the inception of the Treaty of Lisbon in the year 2009, the European Commission did not have exclusive, but instead shared competence on international investment matters.[4] This is because the Community had not established either express or implied exclusive competence in this area, as none of the express treaty provisions or the measures adopted under such provisions covered the entire field of international investment.[5]

INVESTMENT – SALINI TEST

The word investment as per the Oxford Dictionary, states that, *a thing worth buying because it may be profitable or useful in the future.* But investment in terms of BITs and FDI departs from the conventional understanding of the term. Almost all modern day BITs, including those signed by the member states, includes a definition clause in which the term *Investment* is generally defined. It usually refers to every kind of asset having an economic value, regardless of whether the investor has taken managerial control of an undertaking. Recently it has been observed that in cases arising out of disputes concerning Bilateral Investment Treatises, usually one of the most sought after defence invoked by the Respondent is of *Ratione Materia,* i.e. the Subject Matter of the Dispute. Generally BITs do not cover contractual claims and are only limited to the realm of Investments. At international level, both the International Monetary Fund (IMF)[6] and the Organisation for Economic Co-operation and Development (OECD)[7] have attempted to define FDI, and have characterised FDI as a lasting interest with a long-term relationship and influence. From the landmark

[4] See Shan, 'Towards a Common European Community Policy on Investment Issues', 2 J World Investment (2001) 603

[5] Exclusive competence might also be established on the basis of the nature of the measure to be adopted, as established in Opinion 1/76 [1977] ECR 741. However, as confirmed by the ECJ in its Opinions 1/94 and2/92, this principle does not apply to international investment treaty-making: see Opinion 1/94, WTO [1994] ECR I-5267, at paras 84–86; Opinion 2/92, OECD-National Treatment Investment [1995] ECR I-521, at para. 32

[6] The International Monetary Fund (IMF) defines 'direct **investment**' as reflecting the objective of obtaining a lasting interest run by an entity resident in one country in an enterprise resident in another country. The lasting interest implies the existence of a long-term relationship between the direct investor and the enterprise and a significant degree of influence by the investor on the management of the enterprise: IMF,Balance of Payment Manual (5th edn, 1993), available at:http://www.imf.org/external/pubs/ft/bopman/bopman.pdf (accessed on 30th Dec. 2015).

[7] According to the definition of the OECD, 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) which 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. See OECD, *Benchmark Definition of Foreign Direct **Investment*** (4th edn., 2008), at 48. (accessed on 30th Dec. 2015).

Salini Morocoo case[8], the following elements of being an investment were propounded which are nowadays referred to as the *Salini Test* in order to determine whether the investment is covered under the BIT .

a) Contribution of Money or Assets.
b) The Investment should be of certain duration.
c) An Element of Risk.
d) A contribution to the Host State's Economy.

The above stated elements clearly reflects a liberal approach, that now the purpose of an investment is not only to incur profits for the investor but rather it should also contribute to the well being of the host state.

CONFLICT ON JURISDICTION

EXTRA EU BITS

The European Commission has repeatedly pressed upon its competence on investment matters and the cases it brought against Sweden, Austria, and Finland before the European Court of justice (ECJ) confirms the same. It accounts for one of the most important developments in the Commission's effort to assert investment competence. In the year 2004, the Commission notified Austria, Finland, Sweden, and Denmark that some of their pre-accession BITs with non-EU countries (extra-EU BITs) might be in conflict with certain powers reserved to the EU.[9] The EC Treaty permits wide-ranging freedom for movement of capital and payments but allows the Council of Ministers, in exceptional circumstances, to take certain restrictive measures in relation to movements of capital to or from non-EU countries. The EC considered that the BITs in question, particularly the free transfer provisions, might hinder the application of these restrictive measures. According to Article 307 of the EC Treaty, Community law does not automatically prevail over international agreements concluded by Member States prior to their accession.[10] Member States are,

[8] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4 - Accessed from http://www.italaw.com/cases/958#sthash.IQJdUeEu.dpuf, on 6th January, 2016.
[9] Vis-Dunbar, 'European Governments defend BITs in lawsuit brought by EU executive branch',Investment Treaty News, 16 Mar. 2007, Accessed from http://www.iisd.org/pdf/2007/itn_mar16_2007.pdf on 7th January 2016.
[10] Art. 307 TEC, OJ (2006) C 321E/1,
Accessed from http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:PDF , on 3rd January, 2016.

however, obliged to take all appropriate steps to eliminate possible incompatibilities contained in such prior international agreements.[11]

Now if we consider this fact of eliminating the difference between the national legal order and that of the EU some of the member states have not acknowledged the same. The EC's request for BIT modification was rejected by the Member States concerned. The Commission therefore took Sweden and Austria to the ECJ in 2006 and began a similar case against Finland later.[12] The case against Denmark was dropped following Denmark's notification that it would terminate the BIT in question.[13]

For their part, Sweden and Austria argued that until measures to restrict capital flows were enacted, there was no incompatibility between their bilateral investment treaties and the EC Treaty. The ECJ sided with the Commission and accordingly ruled that Austria and Sweden had not fulfilled their obligations under Article 307 TEC. Importantly, the ECJ explicitly held that its findings were 'not limited to the Member State which is the defendant in the present case'.[14] The ECJ also hinted that there almost more than 1,300 EU Member State BITs which are in a violation to the EC Treaty to the extent that they contain similar free transfer provisions.

A similar ruling was delivered in Commission v. Finland[15] in which the ECJ again rejected Finland's assertion that the BIT provisions were not incompatible with Article 307 TEC because they were stated to be subject to the limits authorized by the laws of the contracting parties, of which Community law was a part.[16] The Court considered that the scope, interpretation, and effects of those provisions were too uncertain, and therefore they were not

[11] *Ibid*
[12] Vis-Dunbar, 'European Court of Justice rules that certain Swedish and Austrian BITs are incompatible with the EC Treaty', Investment Treaty News, 4 Mar. 2009, Accessed from: http://www.investmenttreatynews.org/cms/news/archive/2009/03/04/european-court-of-justice-rules-that-certain-swedish-and-austrian-bits-are-incompatible-with-the-ec-treaty.aspx , on 31st December, 2016.
[13] Antell, Carlson, and McCandless, 'The European Commission and Investment Treaties', The European & Middle Eastern Arbitration Review 2010,
Accessed from http://www.globalarbitrationreview.com/reviews/22/sections/81/chapters/829/the-european-commission-investment-treaties/ , on 25th December,2015.
[14] Case C-249/06, EC Commission v. Sweden, Judgment of 3 Mar. 2009, at para. 43, Accessed from http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=Rechercher$docrequire=alldocs&numaff=C-249/06&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100, on 22nd December,2015.
Case C-205/06, EC Commission v. Austria, judgment of 3 Mar. 2009, at para. 43, Accessed from http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=Rechercher$docrequire=alldocs&numaff=C-205/06-&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100 , on 22nd December,2015.
[15] Case C-118/07, C Commission v. Finland. See PLC Arbitration, 'ECJ finds Finland's BITs breach article 307 of the EC Treaty', Accessed from http://arbitration.practicallaw.com/1-500-8076 , on 28th December, 2016.
[16] *Ibid.*

sufficient to ensure compatibility with Article 307 TEC. Accordingly, Finland should have renegotiated the treaties to bring them into line with the EC Treaty.

The inevitable conclusion from the above mentioned cases is that the success of the Union in these extra-EU BIT cases has confirmed a basic principle of EC law, namely the supremacy of EC law over national law. The Bilateral Investment Treatises of Member States can be considered as part of the national legal order. It also demonstrates that the Union does possess competence in foreign investment matters, which may not be violated even where such competence has not been exercised by the Union. This has led to the termination of a number of BITs between non EU members as well so as to maintain parity.

INTRA EU BITS

The Commission had also shown keen interest in Intra-EU BITs, i.e. Bilateral Investment Treatises formulated and signed between countries which are a part of the European Union. In 2006, the Commission submitted an informal note to the Economic and Financial Committee of the Council (EFC) of the EU thereby conveying its disregard to the continued existence of intra-EU BITs. The contention of the Commission has been that the BITs between the member states should be terminated with immediate effect as its existence is of no use, as all the provisions of the BIT are already covered by the EC law. This has led to a massive debate questioning the legal character of the BITs after the accession of the countries to the European Union. The Commission has also raised concern about the fact that the investors could try to practice forum shopping by submitting claims to BIT arbitration instead of or in addition to the national courts.

The very base root of such contentions is that the Commission has been of the view that these BIT arbitration take place without relevant questions of EC law being submitted to the ECJ, and therefore an unequal treatment of investors among Member States is a possible outcome.[17] But to the contrary the member states have dissented from such a view regarding arbitration risks and discriminatory treatment of investors and a clear majority of member states have preferred to maintain the existing agreements.

[17] Vis-Dunbar, 'EU member states reject the call to terminate intra-EU bilateral investment treaties', Investment Treaty News, 10 Feb. 2009,
Accessed from http://www.investmenttreatynews.org/cms/news/archive/2009/02/10/eu-member-states-reject-the-call-to-terminate-intra-eu-bilateral-investment-treaties.aspx , on 26th December, 2015.

Now a very important question comes before us that whether the accession of a certain country to the European Union automatically annuls all its intra EU BITs? The Arbitral Tribunals have answered in the negative and have held that intra-EU BITs were not implicitly terminated when those countries acceded to the EU. The very important development in this matter is the case of *Eastern Sugar v. Czech Republic.*[18] In this case which was adjudicated upon by an arbitral tribunal, the *fora* rejected the arguments which was advanced by Czech Republic that all of its BITs with other EU Member States were implicitly terminated when it acceded to the EU.[19] Other cases such as R.J. Binder v. The Czech Republic,[20]Saluka v. The Czech Republic,[21] and Micula v. Romania[22] have also touched upon similar issues.

This had led to several EU Member States terminating their intra EU BITs. The Czech Republic is understandably leading this effort and announced in 2005 its intention to terminate all of its BITs with other EU Member States.[23] The Italy-Czech Republic BIT has already been terminated, while the termination of Denmark-Czech Republic BIT is on the way.[24] Recently Slovenia and Malta announced that they intended to terminate their own BITs.[25] Italy has also evinced the same intention. [26]However, some EU Member States do not agree with the Czech Republic's approach. They reportedly include Belgium, Germany, the Netherlands, and the United Kingdom.It is noted that many of the recent disputes brought against the Czech Republic arose under BITs with some of those countries.

In many of the cases which are brought before the arbitral tribunals to be adjudicated upon and which are based on Bilateral Investment Treatises, the Commission was granted

[18] Eastern Sugar BV v Czech Republic, Partial award and partial dissenting opinion, SCC Case No 088/2004, IIC 310 (2007), 27th March 2007, Chamber of Commerce [SCC]
[19] *Ibid.*
[20] Vis-Dunbar, 'Czech Republic quietly pursues challenge to jurisdictional ruling in Prague Court', Investment Treaty News, 17 Jan. 2008, Accessed from http://www.iisd.org/pdf/2008/itn_jan17_2008.pdf , on 8th January, 2016.
[21] See Permanent Court of Arbitration, Saluka Investments BV v. Czech Republic, Accessed from http://www.pca-cpa.org/showpage.asp?pag_id=1149 on 21st December, 2015.
[22] Ioan Micula, Viorel Micula and others v. Romania (ICSID Case No. ARB/05/20)
[23] Vis-Dunbar, 'Czech Republic pursues shake-up of its bilateral investment treaties', Investment Treaty News, 21 Nov. 2005Accessed from http://www.iisd.org/pdf/2005/investment_investsd_nov21_2005.pdf , on 3rd January, 2016.
[24] 'Italy, Slovenia and Malta concur with Czech Republic on lack of necessity for intra-EU BITs; Italy-Czech treaty has been terminated' and 'Denmark and Czech Republic working to terminate investmenttreaty; not all EU member-states agree with the Czech view that intra-EU treaties are unnecessary',Investment Arbitration Reporter, 6 Aug. 2009 and 17 July 2009.
[25] 'Italy, Slovenia and Malta concur with Czech Republic on lack of necessity for intra-EU BTTs; Italy-Czech treaty has been terminated', Investment Arbitration Reporter, 6 Aug. 2009.
[26] *Ibid.*

permission to file non-party submissions.[27] While the submissions have not yet been made public, it is generally understood that the Commission intervened in order to defend its member state as they acted in conformity to the EU law.[28] The Commission also reportedly sought to challenge the jurisdiction of the tribunal on the ground that some aspects of the dispute and the underlying contract from which the dispute arose were subject to EU law, and therefore within the jurisdiction of the Commission.[29]

INTERPRETATIONS – EU'S COMPETENCE OVER FDI

TRADE-RELATED ASPECT COMPETENCE

This is perhaps the narrowest interpretation in lieu of the word investment under the Common Commercial Policy of the European Union and especially after the Treaty of Lisbon. Krajewiki, for example, considers that only those aspects of FDI which are directly linked to international trade agreements would fall within the EU's exclusive competence, on the basis of the context, object, and purpose as well as negotiating history of the Treaty.[30] He is of the view that since no deliberations took place while preparing the European Constitution in order to extend the realm of investment beyond trade related aspects such an interpretation still stands tall.[31]This interpretation, however, is probably too restrictive and conservative. First, although in the immediate context the CCP is termed 'commercial', which traditionally means 'trade' (or indeed 'trade in goods'), its ambit has been significantly expanded to include all kinds of economic activities. The argument given against this interpretation is that if the Member States would have wished to confine investment only to its trade related aspects, then the Lisbon Treaty would have stated this explicitly by using the 'trade related aspects' qualification, as it did with regard to intellectual property rights. Moreover, the object and purpose of the CCP under the Lisbon Treaty, listed the prohibition of restriction on both 'international trade' and 'foreign direct investment' in parallel, suggesting that the latter must go beyond the traditional boundary of the former and should not be confined to just 'trade-related aspects' of FDI issues. This interpretation thus reflects a narrow approach and therefore should be rejected.

[27] 'ICSID tribunal will permit European Commission to file legal brief in Energy Charter Treaty arbitration', Investment Treaty News, 11 Dec. 2008; 'European Commission moves to intervene in another ICSID arbitration', Investment Arbitration Reporter, 11 May 2009.
[28] *Ibid.*
[29] *Ibid.*
[30] Krajewiki, 'External Trade Law and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy?', 42 CML Rev (2005) 91, at 112- 114.
[31] *Ibid* at 114.

INVESTMENT LIBERALIZATION COMPETENCE

The second interpretation is that the inclusion of FDI brings under the CCP lacks the key ingredient of investment protection and is only confined to investment liberalization and market accesses. Leczykiewicz seems to be of this view. Relying on the object of the CCP under Article 206 TFEU, she argued that 'foreign investment is only part of the common commercial policy as far as restrictions on foreign direct investment are concerned, but not where investment protection against expropriation is concerned'[32]. This interpretation too doesn't clarify the picture. There are reasons supporting the rejection as the ECJ has categorically stated that the inclusion of FDI under the CCP not only includes investment liberalization but is inclusive of measures of investment protection.

SUBSTANTIALLY LIMITED COMPREHENSIVE COMPETENCE

The third interpretation is provided by Ceyssens who supports a broad reading of the new FDI competence to cover both investment liberalization and regulation, but excludes two important areas: investment protection against expropriation and a general standard of fair and equitable treatment.[33] But even this interpretation is sidelined by the fact that now the concept of fair and equitable treatment (FET) is not only confined to Bilateral Investment Treatises but instead has now become a rule of international law and is not determined by the laws of the host state. Several Arbitral Tribunals have repeatedly emphasized that this treatment standard is independent of the national treatment standard.[34] As part of customary international law, the FET treatment shall be upheld within and beyond the EU regardless of the division of competence between it and its Member States. The exclusion of the FET standard therefore does not make sense in practical terms. For the above considerations, the exception of expropriation and FET from the coverage of the EU's FDI competence should be rejected.

NEGOTIATION COMPETENCE

This interpretation gives a very different approach that the inclusion of FDI enables the EU competence only to negotiate and conclude agreements in this area, not to enter into substantive rights and obligations. In other words, the EU has only 'negotiation competence',

[32] Leczykiewicz, 'Common Commercial Policy: The Expanding Competence of the European Union in the Area of International Trade', 6 German LJ (2005) 1673, at 1678.
[33] Ceyssens, 'Towards a Common Foreign Investment Policy? Foreign Investment in the European Commission', 32 Legal Issues of Economic Integration (2005) 259, at 279-281.
[34] R. Dolzer and C. Schreuer, Principles of International Investment Law (2008), at 123.

but no 'substantive competence'. This interpretation advocates that the EU can act only on behalf of its member states and therefore it does not completely usurp the powers which the member states have vested with them. However, this approach is also not coherent. Article 207 (particularly Article 207(3)–(4)) TFEU covers both internal acts such as legislation and external acts including the negotiation and conclusion of treaties. Accordingly, the Article confers on the Union not only procedural rights such as treaty negotiation, but also substantive rights such as investment regulation[35].

COMPREHENSIVE FDI COMPETENCE

This interpretation has indeed remained the most debated and controversial among the others. This interpretation has been strongly relied upon and advocated by the European Commission in many of the cases before the Arbitral Tribunals. This interpretation enables the Union to enter into international obligation similar to those included in the US free-trade agreements.[36] Dimopoulos, for example, is of the view that the new EU FDI competence should cover admission, capital movement (transfer), post-admission treatment including FET treatment, performance requirements and free movement of key personnel, expropriation, and investor-state dispute settlement.[37] This effectively covers all major aspects covered by a typical BIT.

One must note that the Union's exclusive competence on investment has been confined to 'foreign direct investment', while BITs typically cover both direct and indirect investment. The latter, which is also termed 'portfolio investment', lies beyond the exclusive competence of the Union.

VIENNA CONVENTION ON LAW OF TREATISES

The 2004 enlargement has drastically increased the number of intra EU BITs to about 150 after the accession of about 10 new member states to the European Union.[38]Before the enlargement there were only a handful of intra EU BITs most of them signed in the 1990s to

[35] Mola, 'Which Role for the EU in the Development of International Investment Law?', Society of International Economic Law Inaugural Conference, Geneva, 15–17 July 2008, Accessed from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154583

[36] Bungenberg, 'Going Global? The EU Common Commercial Policy After Lisbon', in C. Herrmann and J.P. Terhechte (eds), European Yearbook of International Economic Law 2010 (2010) 123, at 143.

[37] Dimopoulos, 'The Common Commercial Policy After the Lisbon Treaty: Establishing Parallelism Between Internal and External Economic Relations?', 4 Croatian Yrbk European L and Policy (2008) 101 at 23-25.

[38] The 10 countries, which are mainly from Eastern Europe, are Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia.

strengthen market economies. The dramatic increase of the intra-EU BITs has elevated the conflict between intra-EU BITs and EU law to reality. Now a very important question emerges in this aspect is whether the EU's new FDI competence under the CCP could change the answer given by the tribunal in the Eastern Sugar case? Or in simpler words, whether the intra-EU BITs would become automatically and implicitly terminated or suspended after Lisbon? To answer this, Art. 59 of the Vienna Convention on Law of Treatises comes into picture:

Article 59

Termination or suspension of the operation of a treaty implied by conclusion of a later treaty

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:

a. It appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

b. The provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties [emphasis added].

CONCLUSION

From the above mentioned provision, it is clear that Art. 59 lays down certain conditions upon which a latter treaty shall prevail over a former one. The Bilateral Investment Treatises cover both, i.e. Direct Investments as well as Portfolio or Indirect Investments. This clearly is in contravention to the first clause of Art. 59 which focuses on the *same subject matter*. The Eastern Sugar tribunal examined this issue and concluded in the negative on the basis that the applicable BIT and EC law (Article 57 TEC (Article 64 TFEU)) did not cover the 'same precise subject-matter' even though both dealt with intra-EC investment.[39] Most importantly, the tribunal noted that EC law did not provide the investor-state dispute resolution

[39] Eastern Sugar BV (Netherlands) v. The Czech Republic, Supra note 17, at paras 95–181

mechanism found in BITs, which it considered 'the best guarantee that the investment will be protected against potential undue infringements by the host state'.[40] Moreover, the preceding clauses are subject to the provisions of the first clause itself.

Had it been the intention of the member states to terminate all its existing treatises when they acceded to the EU or when they signed and ratified the Treaty of Lisbon, they would have expressly and explicitly approved of such an interpretation. In the Eastern Sugar case, the tribunal held that a common intention of the Czech Republic and the Netherlands to terminate the BIT or to supersede it by EC law could not be established.[41]

As far as the question of incompatibility is concerned, the BITs were never intended to be in contravention of any particular law of the land or in contravention to customary international law. In Eastern Sugar, the tribunal found that the BIT and the EC Treaty are not incompatible, because free movement of capital and protection of investment are 'different but complementary things'.[42] But this scenario has changed since the amendment of 2009 by the virtue of the Treaty of Lisbon. The jurisprudence behind the emergence of the concept of Bilateral Investment Treatise was that it would harness and promote overseas trade and business and on the other hand will accord due protection to the investors as well. The amendment made by Treaty of Lisbon, which added the word investment under the common commercial policy of the EU under Art. 207 of the TFEU have now raised several questions upon the autonomy of the member states to enter into any form of agreements which they think might be beneficial for the welfare of their own country. The Lisbon Treaty confers on the EU only a general (albeit exclusive) competence on FDI but does not offer any further details as to how the EU should treat and regulate FDI. The European Union has been pressing upon its supremacy over the national legal order of the Member States.

Another very important aspect which emerges in this regard is the applicability of the Survival Clause. Most of the modern day BITs, contain a survival clause which provide for a specific time period during which the provisions of the BIT shall remain in force despite its termination. This has added another thread to the argument that even if the ECJ is pressing upon its jurisdiction over the investment disputes because of the Unions' new competence

[40] *Ibid*., at para. 165.
[41] *Ibid*., at para. 167.
[42] *Ibid.*, at paras 168–169

over FDI, the question which arises here is the arbitral tribunals still have jurisdiction by virtue of the survival clause.

From the aforementioned explanations, it can be concluded that the new competence of the European Union over Foreign Direct Investments does not automatically annul or terminated all the existing intra EU BITs between the member states of the European Union. However since the amendment made by the Treaty of Lisbon, 2009, now the member states stands deprived of entering into any new Bilateral Investment Treatise amongst them.