

SESSION THREE: THE TREATY OF LISBON AND INVESTMENT PROTECTION

FORUMS FOR INVESTOR-STATE DISPUTES AFTER THE TREATY OF LISBON

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1. INTRODUCTION

This paper considers the impact of the Treaty of Lisbon of 13 December 2007¹ on investment treaties of the Community and Member States, namely intra-EU and external bilateral investment treaties (“BITs”) and the Energy Charter Treaty (“ECT”).² First, this paper will briefly examine the preparatory work on the unratified Constitutional Treaty,³ in order better to understand the impact of the Treaty of Lisbon on investment treaties from an EU perspective. The implications of the Treaty of Lisbon on previous BITs of Member States and on the ECT will also be considered in light of customary rules of the Vienna Convention on the Law of Treaties (“VCLT”).⁴ Particularly, the ECT will be examined as a mixed agreement to which the Community, its Member States and third countries are parties. Finally, the paper will discuss what forums for investor-state disputes will be available after the entry into force of the Treaty of Lisbon.

2. PREPARATORY WORK ON THE CONSTITUTIONAL TREATY

- Article III-314 of the Constitutional Treaty:

“By establishing a customs union in accordance with Article III-151, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on *foreign direct investment*, and the lowering of customs and other barriers.” (Emphasis added)

- The Praesidium’s position

- The positions of French, Spanish, German, Portuguese and UK representatives

- Article III-315(4) of the Constitutional Treaty:

“For the negotiation and conclusion of the agreements [with one or more third countries or international organisations], the Council shall act by a qualified majority. For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as *foreign direct investment*, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules ...” (Emphasis added)

¹ *Treaty of Lisbon of 13 December 2007 amending the Treaty on European Union and the Treaty establishing the European Community* [2007] Official Journal of the European Union (17 December 2007) C306/1. At the time of writing the Czech Republic, Ireland and Sweden still have not ratified the Lisbon Treaty. In this paper it will be assumed that the Treaty will enter into force without relevant amendments.

² Energy Charter Treaty (signed 7 December 1994, entered into force 16 April 1998).

³ *Treaty Establishing a Constitution for Europe* [2004] C310 (47) Official Journal (16 December 2004)

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⁴ *Vienna Convention on the Law of Treaties* [adopted 23 May 1969, entered into force 17 January 1980] 1155 United Nations Treaty Series 331.

- Article III-315(6) of the Constitutional Treaty:

“The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States insofar as the Constitution excludes such harmonisation.”

- Article 2 B(1)(e) of the Lisbon Treaty (Article 3(1)(e) of the TFEU):

“The Union shall have exclusive competence in the following areas: ... (e) common commercial policy.”

- Article 188 B of the Lisbon Treaty (Article 206 of the TFEU):

“By establishing a customs union in accordance with Articles 23 to 27, 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.” (Emphasis added)

- Article 188 C of the Lisbon Treaty (Article 207 of the TFEU)

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

2. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy...

4. For the negotiation and conclusion of the agreements [with one or more third countries or international organisations], the Council shall act by a qualified majority. For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as *foreign direct investment*, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules. ...

6. The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States insofar as the Treaties exclude such harmonisation.” (Emphasis added)

3. CAN INTERNATIONAL INVESTMENT AGREEMENTS CONCLUDED BY THE COMMUNITY AND THE MEMBER STATES CO-EXIST FOLLOWING THE TREATY OF LISBON?

a. *An EU perspective*

- Transitional periods in the style of

(a) Council Decision of 9 October 1961 on Standardisation of the Duration of Trade Agreements with Third Countries [1961] Official Journal of the European Communities (4 November 1961) 71/1274.

(b) Council Decision No. 494/69 of 16 December 1969 on the Progressive Standardisation of Agreements concerning Commercial Relations between Member States and Third Countries and on the Negotiation of Community Agreements [1969] Official Journal of the European Communities (29 December 1969) L326/39.

- Mixed competence as in *Commission v. Sweden (Open Skies)*

Case C-468/98 *Commission of the European Communities v. Kingdom of Sweden* [2002] ECR I-9575

- Community's exclusive competence over the common commercial policy

Opinion 1/75 [1975] ECR 1355

Opinion 1/78 [1979] ECR 2871

b. *An international law perspective*

- Intra-EU BITs of Member States

Article 59(1) of the VCLT on implied termination

- External BITs of Member States

Article 62 of the VCLT on termination on the ground of fundamental change of circumstances

- ECT and its mixed procedure

4. CONCLUSION