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The Treaty of Lisbon Expands the EU's External Trade and Investment Powers

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I. Introduction

On December 1, 2009, the Treaty of Lisbon[1] entered into force,[2] fundamentally amending the treaty basis of the European Union (EU) as a supra-national organization, and significantly expanding EU competences in the field of trade and other external commercial relations. The Lisbon Treaty has given the EU exclusive "competence" (power) to conduct its Common Commercial Policy (CCP), now covering practically all aspects of trade in goods, services, commercial aspects of intellectual property rights, and – a completely new feature – foreign direct investment.[3] The Lisbon Treaty also significantly strengthened the role of the European Parliament and substantially reformed the role of the "High Representative of the Union for Foreign Affairs and Security Policy" (HR),[4] supported by the recently established but not yet operational European External Action Service (EEAS).

These institutional reforms have triggered numerous interpretive problems and their legal consequences are unclear. The present *Insight* addresses several of these legal issues and reviews recent academic and political discussions on this topic.

II. The "New" European Union as an Entity under Public International Law

The Treaty of Lisbon has ended the peculiar, often misunderstood "double identity" of the European Community and the EU. The Treaty explicitly grants legal personality to the EU;[5] the EU succeeds to all EC rights and obligations under public international law.[6] The EU's organs have informed all countries and relevant international organizations, including the World Trade Organization (WTO), of this change and its effects.[7]

III. The Treaty's System of Competences, the Explicit Exclusivity of the CCP, and the General Objectives of EU External Action

The Treaty of Lisbon, for the first time ever, sets out explicitly the various competences that the Member States have transferred to the EU—i.e., the exclusive, shared, and supportive competences—and enumerates the policies that fall into these categories.[8] It also explicitly gives the EU the exclusive competence to conclude international agreements if an agreement is necessary to enable the EU to exercise an internal competence; if the conclusion of the agreement may affect EU rules; or if EU legislation so provides. The competence issue matters because of its impact on the powers of the Member States. In areas where EU competence is exclusive, policy and legislation are made only collectively by the EU institutions; where it is shared, Member State governments also can make rules; where it is supportive, Member States take the lead and the EU has only a supporting role.

The Treaty lists the CCP as an exclusive competence of the EU,[9] prohibiting EU Member States from legislating or adopting legally binding acts within this domain (including international agreements) without EU approval.[10] Unlike the previous legal situation, where the EC's exclusive competence only included trade in goods, cross-border trade in services (Mode 1), and border measures against counterfeited or pirated goods,[11] the zone of EU

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exclusivity now includes all aspects of trade in goods, services, and commercial aspects of intellectual property rights. Thus, an agreement amending the EU's schedule of specific commitments under the General Agreement on Trade in Services (GATS) can now be concluded by the EU alone, an action that previously required agreement by both the EC and its Member States.[12] German academic commentators have been debating whether the EU alone can adopt a Final Act of the Doha Round, and what effects that might have. EU Member States are still calling for mixed agreements (adopted by both the EU and the Member States) for WTO-related agreements, based on remaining shared competences in transport services[13] and criminal sanctions in the field of intellectual property protection. If the Doha Round ever produces a Final Act, this issue may have to be resolved by the European Court of Justice (ECJ).

The Treaty's provisions on the CCP equip the CCP with economic policy goals like market opening,[14] but also call for the CCP to be conducted in the context of broader "objectives" for the external policies of the EU, reaching from democracy to good global governance.[15] Given the generality and potential for contradiction between these goals, the organs responsible for the conduct of the CCP must enjoy wide discretion in pursuing these objectives, and the ECJ is unlikely to strike down particular measures as breaching these objectives. Their normative power must nevertheless not be underestimated, and the European Parliament will most likely closely supervise the Commission and the Council in that regard.

IV. The Reformed Institutional Set-up of EU Commercial Policymaking: Qualified Majority Voting, the High Representative, and the Role of the European Parliament

The institutional set-up of the European Union is a major focus of the Treaty, which extends the participatory rights of the European Parliament in the so-called "ordinary legislative procedure."[16] The Treaty also completely changes the requirements for a "qualified majority" in the Council (the EU's main legislative body), starting on November 1, 2014.[17] When the Council authorizes negotiation and conclusion of agreements with third countries, authorizes trade sanctions, and makes most of its decisions on legislation, it acts by a qualified majority.

The Treaty of Lisbon introduces two new actors: the President of the European Council, representing the Union vis-à-vis third States on the level of Heads of State and Government as far as the Common Foreign and Security Policy (CFSP) is concerned;[18] and the HR. Whereas the President has no dealings with the CCP, the HR (currently the former EC Commissioner for Trade, Baroness Catherine Ashton) ensures that the EU's external actions are coherent, and coordinates the CFSP and the other external dimensions of the EU's policy, including the CCP.[19] However, the HR does not preside over meetings of the EU's Foreign Affairs Council when the Council deals with CCP matters.[20] The HR is supported by the EEAS, which is still being developed. Notably—and not fully consistent with the plain language of the Treaty—the EEAS will also have no say in the field of the CCP. Consequently, the CCP remains the domain of the Council, dominated by the Member States and the Commission's Directorate General for Trade.

The European Parliament, which formerly had only a voluntary hearing opportunity granted by the Commission, has achieved full participation in all matters falling within the CCP, e.g., trade in goods, services, commercial aspects of intellectual property rights, and foreign direct investment. For the regulations (i.e., EU "laws")[21] defining the framework for the conduct of the CCP, the ordinary legislative procedure applies.[22] Consequently, the consent of the Parliament (without the right to ask for amendments, *ergo* "fast track") is also necessary for concluding international agreements based on the trade competence of the EU, irrespective of whether the agreement does affect the "framework" of the CCP.[23] This expansion of parliamentary participation will undoubtedly have an impact on EU trade policymaking, given that the Parliament is usually much more responsive to environmental or social policy demands voiced by NGOs and other organizations, in particular contemplating the far-reaching policy objectives of EU external action which now govern the conduct of the CCP (see above).

V. Substantive Expansions of EU Competences in the Field of Trade and Investment

The Lisbon Treaty gives the EU exclusive competence for trade in services and commercial aspects of intellectual property rights, where it had previously been shared in part by the EC and the Member States. However, this does not mean a substantive expansion of competences, but rather a mere change in the character of the competence already conferred.

But the Treaty confers on the EU a completely new competence for "foreign direct investment"[24] —even though the EC already had some legislative powers in the field of establishment and free movement of capital. Not surprisingly, most current academic and political comment on the Treaty has been directed to the scope and consequences of EU's new powers in the area of investment.[25] Some issues raised deserve particular attention, and possibly even legislative action.

Does the EU's new competence in this area cover all investment? No. There is far-reaching consensus among scholars that the Treaty text does not give the EU competence over portfolio investments.[26] Since many international investment agreements do not distinguish between direct and portfolio investment, it is necessary to draw a line between the two for EU purposes. The dominant academic interpretation in light of international policy (e.g., International Monetary Fund (IMF), Organization for Economic Co-operation and Development (OECD), and case law of the ECJ) argues that a direct investment consists of a long-term interest in a company with some kind of managerial influence, normally with over ten per cent of the capital.[27] Measures only affecting such investments—e.g., restrictions on acquisition of more than twenty-five per cent of capital of a company, introduced by Germany in 2009—would now clearly fall into the exclusive competence of the EU. For measures affecting all kinds of investments, irrespective of the capital share held by the investor, the EU would have to resort additionally to other competences, e.g., in the field of free movement of capital. The exclusivity of the latter competence, however, is disputed.

Legal scholars disagree on which types of investment measures fall into the competence for foreign direct investment, given that it forms part of the CCP.[28] Three types of measures can be distinguished: (1) market access; (2) post-establishment standards of treatment; and (3) protection against expropriation. Many support an extensive interpretation covering all three types of measures.

The EU's new competence for foreign direct investment has the unambiguous effect that the Member States cannot any longer conclude Bilateral Investment Treaties (BITs) without the EU's prior consent.[29] The Commission has recently published a proposed regulation which would provide a permission procedure and specify the consequences of such a permission.[30] The proposed regulation would require Member States to notify all of their existing investment agreements, which would then benefit from a general (but withdrawable) permission. In light of the estimated 1300 BITs involving the Member States, this development is extremely significant. Building upon its "Minimum Platform on Investment,"[31] the EU will now try to negotiate its own investment agreements (EU BITs) with major third countries, such as China and India. Because the EU lacks competence for portfolio investment, these EU BITs will need to be concluded as "mixed agreements," with the Member States concluding the agreements together with the EU.

VI. Consequences for the Trade and Investment Policies of EU Member States

Despite the transfer of competences to the EU, the BITs concluded previously remain uncontested. Under public international law, they benefit from the *pacta sunt servanda* principle.[32] Similarly, under EU law, Article 351 of the Treaty on the Functioning of the European Union allows Member States to fulfill their obligations toward third states despite a possible conflict with EU law. This principle will remain the same under the proposed regulation mentioned above.[33] However, insofar as Member States' BITs are in substantive conflict with EU law – e.g., because they lack a regional economic integration clause or a clause ensuring the effectiveness of EU restrictions on capital movements – Member States must either re-negotiate or terminate these BITs.[34]

Generally speaking, as a result of the amendments to the CCP brought about by the Treaty of Lisbon in the field of foreign direct investment, the era of Member States' BITs is coming to an end. Under future mixed EU-Member State BITs, new questions will have to be answered, including questions regarding accession of the EU to the International Centre for Settlement of Investment Disputes (ICSID) and the allocation of liability under mixed BITs.

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Endnotes

[1] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O. J. (C 306) 1, *available at* http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:en:HTML.

[2] *See* Dr. Nikolaos Lavranos, *The Entering Into Force of the Lisbon Treaty – A European Odyssey*, *in* 13 ASIL INSIGHTS 26, Dec. 14, 2009, *available at* http://www.asil.org/insights091214.cfm.

[3] Consolidated Version of the Treaty on the Functioning of the European Union art. 3(1)(e), 206-07, Mar. 30, 2010, 2010 O.J. (C 83) 47, *available at* http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2010:083:SOM:EN:HTML [hereinafter TFEU].

[4] *See* Consolidated Version of the Treaty on European Union art. 18, 2010 O.J. (C 83) 13, *available at* http://eur-lex.europa.eu /JOHtml.do?uri=OJ:C:2010:083:SOM:EN:HTML [hereinafter TEU].

[5] TEU art. 47.

[6] *Id.* art. 1.

[7] WTO Notification, *Verbal Note from the Council of the European Union and the Commission of the European Communities*, WT/L/779 (Nov. 30, 2009).

[8] *See* TFEU arts. 2-6.

[9] *Id.* art. 3(1)(e).

[10] *Id.* art. 2(1).

[11] Opinion 1/94, Competence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property - Article 228 (6) of the EC Treaty, 1994 E.C.R. I-5267.

[12] *See* Opinion 1/08, Opinion pursuant to Article 300(6) EC – General Agreement on Trade in Services (GATS), *available at* http://eur-lex.europa.eu /LexUriServ/LexUriServ.do?uri=CELEX:62008V0001:EN:HTML.

[13] *See* TFEU art. 207(5).

[14] *Id.* art. 205, 207(1).

[15] *See* TEU art. 21(2).

[16] TFEU art. 289(1), 294.

[17] TEU art. 16(4).

[18] *Id.* art 15(6).

[19] *Id.* art. 18(4).

[20] *See* Council Decision of 1 December 2009 Adopting the Council's Rules of Procedure, Annex art. 2(5) n.1, 2009 O. J. (L 325), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:325:0035:0061:EN:PDF.

[21] *See* TFEU art. 288.

[22] *Id.* art. 207(2).

[23] *Id.* art. 218(6)(a)(v). *But see* Markus Krajewski, *External Trade Law and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy?*, 42 COMM. MKT. L. REV. 91, 122 *et seq.* (2005).

[24] TFEU art. 206, 207(1).

[25] *See* Marc Bungenberg, *Going Global? The EU Common Commercial Policy After Lisbon*, EUR. Y.B. INT'L ECON. L. 1, 123 (2010); Jan Ceyssens, *Towards a Common Foreign Investment Policy? – Foreign Investment in the European Constitution, in* LEGAL ISSUES OF ECONOMIC INTEGRATION 259 (2005); Joachim Karl, *The Competence for Foreign Direct Investment – New Powers for the European Union?*, 5 J. WORLD INVESTMENT & TRADE at 413 (2004); Marc Bungenberg, Joern Griebel, & Steffen Hindelang, eds., *International Investment Law and EU Law*, EUR. Y.B. INT'L ECON. L. (forthcoming 2010/2011 spec. issue).

[26] *See* Bungenberg, *Going Global?*, *supra* note 25, at 123, 144 *et seq.*, 146 *et seq.*; Karl, *supra* note 25, at 413, 433 *et seq.*

[27] *See* Ceyssens, *supra* note 25, at 259, 274 *et seq.*

[28] Bungenberg, *Going Global?*, *supra* note 25, at 123, 142 *et seq.*

[29] TFEU art. 2(1).

[30] *Proposal for a Regulation of the European Parliament and of the Council Establishing Transitional Arrangements for Bilateral Investment Agreements Between Member States and Third Countries*, COM (2010) 344 final (July 7, 2010), *available at* http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146308.pdf; *see also 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 final (July 7, 2010), *available at* http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf.

[31] *See* Niklas Maydell, *The European Community's Minimum Platform on Investment or the Trojan Horse of Investment Competence*, *in* INTERNATIONAL INVESTMENT LAW IN CONTEXT 73 (August Reinisch & Christina Knahr eds., 2007).

[32] Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331.

[33] *See* TFEU art. 351; *see also Proposal for a Regulation*, *supra* note 30.

[34] *See* Case C-205/06,Comm'n v. Austria, 2009 E.C.R. I-1301; Case C-249/06, Comm'n v. Sweden, 2009 E.C.R. I-1335; Case C-118/07, Comm'n v. Finland, 2009 E.C.R. I-0000.