



# THE EU INTERNATIONAL INVESTMENT POLICY AFTER THE TREATY OF LISBON 2009

## AN INSTITUTIONAL PERSPECTIVE

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# Abstract

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### An Institutional Perspective

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This PhD evaluates the process of integration in the Common Commercial Policy (CCP), after the entry into force of the Treaty of Lisbon 2009. The recent amendments have started a new chapter in the evolution of the CCP, which involves the expansion of the Union's competences into the area of international investment. Through examining the ongoing interinstitutional conflict concerning the EU comprehensive investment policy, this thesis accounts for the role of the EU institutions in the process of integration in the CCP.

To that end, the neofunctionalist theory has been adopted as a framework for the analysis. The theory places the EU institutions at the heart of the process of integration. In accordance with the neofunctionalist assumptions, the EU institutions have a propensity to further the process of integration by exploiting existing functional structures. The revised version of the theory presents the processes of integration as dialectical in nature, i.e. affected by both positive and negative forces. This PhD finds that depending on the context, the EU institution may adopt different roles in the process of integration. In relation to the future expansion of the CCP, the Commission and the European Parliament emerge as sources of pro-integrative pressures, but the Council and the Court of Justice of the European Union are considered as sources of countervailing forces. Thus, the future expansion of the CCP will be affected by the outcome of the currently ongoing interinstitutional conflict.

This PhD finds that, to date, the countervailing forces prevail in the dialectical process of integration in the CCP and concludes that further transfer of investment competences from the Member States to the EU should not be taken for granted.

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## **Abbreviations**

BIT- Bilateral Investment Treaty

CETA- Comprehensive Economic and Trade Agreement

CJEU- Court of Justice of the European Union

CCP- Common Commercial Policy

EEC- Treaty Establishing the European Economic Community

EU- European Union

FET- Fair and Equitable Treatment

FDI- Foreign Direct Investment

GATT- The General Agreement on Tariffs and Trade

GATS- The General Agreement on Trade in Services

ICSID- The International Centre for Settlement of Investment Disputes

IGC- Intergovernmental Conference

MFN- Most Favoured Nation

OECD– Organisation for Economic Co-operation and Development

TFEU - Treaty on the Functioning of the European Union

TEC - Treaty Establishing the European Community

TEU - Treaty on European Union

TTIP – Transatlantic Trade and Investment Partnership

TRIPS - The Agreement on Trade-Related Aspects of Intellectual Property Rights

UNCITRAL- The United Nations Commission on International Trade Law

UNCTAD - United Nations Conference on Trade and Development

WTO – World Trade Organisation

# Chapter 1.

## Introduction- Theoretical Framework

### 1.1. The Background for the Study

Established in the Treaty of Rome 1958, the Common Commercial Policy (CCP) is one of the oldest areas of the European Union (EU) competence<sup>1</sup>. In the beginning, the policy had been considered mainly as a necessary element of an effectively functioning customs union<sup>2</sup>. Thus, in its early years, the main goal behind the CCP was to enable the EU to implement a common external tariff on goods that were exchanged with third countries. As the global commerce evolved, so did the scope of the EU external action and the function of the CCP. Today, the external commercial powers are an essential element of the common foreign policy that is used by the Union to assert itself as a global actor<sup>3</sup>. In the light of its significance for the EU's position on the international scene strong integrative pressures have always existed in this policy area. Since the latest Treaty revision, the CCP has been one of the most integrated spheres of the Union's activity encompassing trade in goods, services, commercial aspects of intellectual property rights and foreign direct investment (FDI)<sup>4</sup>. Notwithstanding the wide scope of the EU competence, the character of the CCP is not entirely supranational yet. A new phase in the process of integration in the CCP has started with the entry into force of the Treaty of Lisbon 2009, which is the main subject of enquiry in this thesis.

The recent addition of FDI to the scope of the CCP has enabled the EU to develop a common policy on international investment. This process has commenced immediately after the entry into force of the Treaty of Lisbon 2009. In 2010 Communication<sup>5</sup>, the Commission outlined, for the first time, the Union's ambitious plans to establish a comprehensive approach to protection of international investment. Common rules in the EU treaties concluded with third countries are intended to replace existing Bilateral

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<sup>1</sup> Treaty Establishing the European Economic Community [1958], Article 113.

<sup>2</sup> Piet Eeckhout, *EU External Relations Law* (OUP 2011), 239.

<sup>3</sup> Luca Pantaleo and Mads Andenæs, 'Introduction: The European Union as a Global (Legal) Role Model for Trade and Investment' (2017) 28 EBLR 100.

<sup>4</sup> Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 (TFEU), Art 207.

<sup>5</sup> Commission, 'Towards a comprehensive European International Investment Policy' (Communication) COM (2010) 343 final.

Investment Treaties (BIT) of the Member States<sup>6</sup>. However, in the light of the Union's lack of experience in the field of international investment and a well-established position of some Member States, the Commission faces many obstacles in its efforts directed at the implementation of the Union's strategy for investment protection. The difficulty of the Commission's task is exacerbated by the non-exclusive nature of the EU competences<sup>7</sup>. As the analysis in the subsequent chapters indicates, such a division of powers between the Union and the Member States undermines the former's external action.

Against this background, this thesis focuses on the future of integration in the CCP. The PhD examines a possibility of further transfer of investment competences to the EU to enable its completely autonomous action in the field of international investment. The analysis concerns the developments since the entry into force of the Treaty of Lisbon on 1 December 2009. The main subject of the analysis is the interinstitutional dynamic in the CCP in the post-Lisbon era. The assumption on which the central research question is based posits that the EU institutions are actors in the process of integration and impact on its outcome. This is consistent with the neofunctionalist theory of integration, which provides a framework for the examination conducted in this PhD.

## **1.2. The Theoretical Underpinnings**

The neofunctionalist theory has defined regional integration as:

“... the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new centre, whose institutions possess or demand jurisdiction over the pre-existing national states. The end result of political integration is a new political community, superimposed over the pre-existing ones.”<sup>8</sup>

A gradual shift of national loyalties to the supranational centre can be observed in the evolution of the CCP and the recently introduced amendments are an important milestone in this process. The Treaty of Lisbon 2009 expanded the range of the Union's activities

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<sup>6</sup> Regulation 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries [2012] OJ L351/40.

<sup>7</sup> Opinion 2/15 *Free Trade Agreement between the European Union and the Republic of Singapore* [2017] OJ C239/3 (Opinion 2/15).

<sup>8</sup> Ernst B. Haas, *Uniting Europe: Political, Social and Economic Forces 1950-1957* (Stanford University Press 1968), 16.

on the international scene by adding FDI to the scope of the CCP<sup>9</sup>. However, as evaluated in greater detail in Chapter 2, in relation to this policy area, the initial transfer of the new powers marks merely the start of a new phase in the process of integration. In the context of investment, the transfer of FDI competences has not enabled the EU to pursue an international investment policy independently of the Member States<sup>10</sup>. From the perspective of the neofunctionalist theory, it appears that the Member States have not been fully persuaded to shift their loyalties to the supranational centre with respect to this area of their foreign policies. Nonetheless, the expansion of the CCP created a functional structure, which enables the Union to expand its competences. As the integration in the CCP continues in the post-Lisbon era, the task ahead of the EU is to convince the Member States that an entirely supranational action in the sphere of investment is the optimal choice. This study examines different forces that affect this process.

Despite considerable criticism that had been levelled against the neofunctionalist framework over the years<sup>11</sup>, the theory has continued to be developed and revised in numerous accounts, since its original formulation by Haas<sup>12</sup>. In the context of this thesis, it is important to note that the main opposition against the neofunctionalist framework has not concerned its inaccuracy in describing integration in the EU, but its lack of capacity to become a general theory of regional integration<sup>13</sup>. The neofunctionalist theory has proven particularly useful in explaining legal developments in the EU<sup>14</sup>. In the light of its continued relevance, neofunctionalism has been adopted as a theoretical framework for this enquiry. However, in this context, it needs to be emphasised that this study does not seek to provide a comprehensive explanation of the nature of EU integration in all

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<sup>9</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/1.

<sup>10</sup> Opinion 2/15 (n 2).

<sup>11</sup> Arne Niemann and Philippe C. Schmitter, 'Neofunctionalism' in Antje Wiener, Thomas Diez (eds), *European Integration Theory* (2<sup>nd</sup> edn, OUP 2009); Mette Eilstrup-Sangiovanni, 'Neofunctionalism and its Critics', in Mette Eilstrup-Sangiovanni (ed), *Debates on European Integration: A Reader* (Palgrave Macmillan 2006) 94.

<sup>12</sup> Jeppe Tranholm-Mikkelsen, 'Neo-functionalism: Obstinate or Obsolete? A Reappraisal in the Light of the New Dynamism of the EC' (1991) 20 *Millennium* 1; Philippe C Schmitter, 'Ernst B Haas and The Legacy of Neofunctionalism' (2005) 12 *Journal of European Public Policy* 255; Arne Niemann, *Explaining Decisions in the European Union* (CUP 2006).

<sup>13</sup> Ben Rosamond, 'The Uniting of Europe and the Foundation of the EU Studies: Revisiting the Neofunctionalism by Ernst B. Haas' (2005) 12 *Journal of European Public Policy* 237, 243.

<sup>14</sup> Alec Stone-Sweet, *The Judicial Construction of Europe* (OUP 2004); Eric Stein, 'Lawyers, Judges and the Making of a Transnational Constitution' (1981) 75 *AJIL* 1; Anne-Marie Burley and Walter Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) 47 *International Organization* 42; Gráinne de Búrca, 'Rethinking Law in Neofunctionalist Theory' (2005) 12(2) *Journal of European Public Policy* 310.

areas<sup>15</sup>. The main objective of this work is to explain the dynamic of the process of integration in the CCP since the entry into force of the Treaty of Lisbon 2009 in order to determine its likely future direction and pace.

### **1.2.1. The Revised Neofunctionalist Framework**

Although the most basic assumptions of the neofunctionalism have withstood the test of time with regard to the process of integration in the EU, the general framework has been revised in later accounts to reflect the evolving institutional structures of the Union. In this context Rosamond has highlighted the dynamic nature of the theory itself and its almost ‘pathological tendency towards auto-critique’<sup>16</sup>. One of the most comprehensive revisions of the neofunctionalism was undertaken by Arne Niemann. In his book, entitled *Explaining Decisions in the European Union*, Niemann modified some of the neofunctionalist assumptions based on an empirical examination of the decision-making process in three different areas of EU competence<sup>17</sup>. This updated version of the neofunctionalist theory convincingly addresses some of the criticisms levelled against Haas’s original formulation and provides a theoretical framework for enquiry in this thesis. The section below outlines the basic assumptions of the revised neofunctionalist framework and their applicability to the analysis in this PhD.

First of all, regional integration is understood and depicted as a continuous process not a series of isolated events<sup>18</sup>. It is, therefore, assumed that the developments in the area of the CCP since the entry into force of the Treaty of Lisbon 2009 will have an impact upon the outcome of the next Treaty negotiations. Secondly, integration is characterised by incremental decision making rather than a grand design<sup>19</sup>. This is confirmed by the evolution of the CCP to date, which has been evaluated in detail in Chapter 2. Thirdly, within the neofunctionalist framework the progress of integration relies on interdependencies and unintended consequences, which are sources of positive pressures that can be utilised to move the process forward<sup>20</sup>. In this context, the development of the EU international investment policy is considered to be an unintended consequence of the Member States’ decision to add FDI to the scope of the CCP, which puts pressure for its

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<sup>15</sup> Donald Puchala, ‘Of Blind Men and Elephant and International Integration’ (1971) 10 *Journal of Common Market Studies* 267.

<sup>16</sup> Rosamond (n 13) 247.

<sup>17</sup> These included: PHARE Programme, CCP and Visa, Asylum and Immigration Policy. Niemann (n 12).

<sup>18</sup> *Ibid* 24.

<sup>19</sup> *Ibid*.

<sup>20</sup> *Ibid* 34.

further expansion. These three assumptions are considered in the revised neofunctionalist framework as structural components. The progress of integration, however, depends on actions of different actors operating within the functional structures and, in particular, the EU institutions utilising structural components, outlined above in order to persuade the Member States to transfer more of their powers to the supranational centre<sup>21</sup>.

Although assumptions of the revised neofunctionalist framework have been adopted in this analysis, it is not the aim of this work to determine their validity. This task has been left to scholars of international relations, who are more accustomed to conducting empirical examinations, which an enquiry like that requires. This thesis utilises the most recent neofunctionalist framework in order to systematise the doctrinal analysis conducted herein. Nonetheless, in the light of the unique nature of this study some modifications have been proposed to the revised neofunctionalist framework. They relate, in particular, to the part played by the Council of the European Union and the Court of Justice of the European Union (CJEU) in the dialectical process of integration, insofar as the CCP is concerned<sup>22</sup>.

### **1.3. The Central Research Question**

In the light of the theoretical considerations above, this study examines an interaction of the EU institutions within the functional structures of the CCP post-Lisbon in order to determine impact of their actions on the process of integration in this area. The analysis conducted herein, focuses on the contribution of the supranational institutions to the development of the EU's comprehensive international investment policy, which as proposed in Chapter 2, is the new frontier of the CCP. The evaluation of actions of the EU institutions in this sphere uncovers dynamics of the integration process and allows to answer the main research question, which is:

*From the perspective of the neofunctionalist theory of integration what has been the role of the EU institutions in furthering the process of integration in the CCP, since the entry into force of the Treaty of Lisbon 2009?*

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<sup>21</sup> Niemann (n 12) 24.

<sup>22</sup> See: Section 1.4.4.

## **1.4. The Importance of Institutions to the Neofunctionalist Concept of Spillover**

The neofunctionalism is a theory of the dynamics of the European integration, which places the supranational institutions at the heart of the process<sup>23</sup>. One of the core neofunctionalist tenets, characterises actors involved in the process of integration as self-interested and seeking to expand their own powers<sup>24</sup>. As this aim is often achieved through the expansion of the EU competences, the supranational institutions have a propensity to move the integration forward. The institutions can ‘take a life of their own’ when they are created<sup>25</sup>. They also have a capacity to learn and change preferences<sup>26</sup>. These characteristics sometimes make them difficult to control by the Treaty Masters. Furthermore, the institutions rely on the Member States’ imperfect knowledge of consequences of the initial decision to transfer powers to the supranational centre<sup>27</sup>. Thus, through the pursuit of their individual interests, the goal of which is power maximisation, the institutions become an engine of the EU integration.

### **1.4.1. The Concept of Spillover**

Every student of the EU is familiar with the neofunctionalist idea of spillover<sup>28</sup>. The theory uses this concept to encapsulate change. In its early formulations, the assumption posited that the continuity of supranationalisation was ensured because of the interdependencies that existed between economic sectors<sup>29</sup>. In this context, the neofunctionalists have relied on the fact that many parts of states’ economies are so interdependent that it is impossible to treat each of them in isolation. Consequently, integration in one area often creates problems in related fields and their resolution demands ceding more powers to the supranational centre<sup>30</sup>.

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<sup>23</sup> Niemann (n 12) 16; Wayne Sandholtz and Alec Stone-Sweet, ‘Neo-Functionalism and Supranational Governance’ in Erik Jones, Anand Menon and Stephen Weatherill (eds), *The Oxford Handbook of the European Union* (OUP 2012), 20.

<sup>24</sup> Niemann (n 12), 24.

<sup>25</sup> Ibid 27.

<sup>26</sup> Ibid.

<sup>27</sup> Niemann (n 12) 16; Ernst B Haas, ‘The Study of Regional Integration: Reflection on the Joy and Anguish of Pretheorizing’ (1976) 24 *International Organization* 607, 627;

<sup>28</sup> Paul Craig, Gráinne de Búrca, *EU Law: Text, Cases and Materials* (6<sup>th</sup> edn, OUP 2015) 24.

<sup>29</sup> Haas (n 8) 283-317.

<sup>30</sup> Ibid.



The early neofunctionalist theory has mainly focused on the sector-to-sector economic spillover<sup>31</sup>. The revised theoretical framework, however, adopts a wider definition of functional spillover, which encompasses two phenomena, on the one hand, sector-to-sector integration, and, on the other hand, pressures for increased cooperation within the same field, labelled as ‘pressure from within’<sup>32</sup>. The latter type of spillover is particularly relevant to this study. As already mentioned in the description of the basic neofunctionalist assumptions, the decision to develop the common investment policy on the basis of Article 207 Treaty on the Functioning of the European Union (TFEU) creates pressures for further transfer of powers to the supranational centre. The potential of spillover arises, because the current situation does not allow for an autonomous action of the EU in field of international investment, which undermines its effectiveness. Therefore, the first part of this study<sup>33</sup> examines how supranational intuitions sought to exploit the functional pressures that exist within the CCP to ensure its future expansion.

In addition to functional spillover, the revised neofunctionalist framework recognises also the existence of political, exogenous, social and cultivated spillovers<sup>34</sup>. All of these concepts categorise different pro-integrative forces and were introduced with an aim to improve the rigour of the neofunctionalist analysis. Notwithstanding this categorisation, the updated version emphasised that all of these pressures are interlinked and, as put by Tranholm-Mikkelsen, are just different aspects of the same snowball effect<sup>35</sup>.

In the light of the main research question, enquiry in this thesis is focuses mainly on the cultivated spillover. This concept encapsulates efforts of supranational institutions in fostering pressures *vis-à-vis* the Member States, particularly by highlighting functional interdependencies, or by upgrading common interests<sup>36</sup>. Chapters 3 and 4, demonstrate how through their efforts directed at the development of the common investment policy, the Commission and the European Parliament cultivated pressures for further integration in the CCP.

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<sup>31</sup> Haas (n 8) 297; Leon Lindberg, *The Political Dynamics of European Economic Integration* (Stanford University Press 1963) 10.

<sup>32</sup> Niemann (n 12) 30.

<sup>33</sup> Chapters 3 and 4.

<sup>34</sup> Tranholm-Mikkelsen was one of the first people to use this nomenclature. He identified three types of spillover, i.e.: functional, political and cultivated. The list was later expanded by Niemann who recognised exogenous and social spillovers. Tranholm-Mikkelsen (n 12) 4-6; Niemann, (n 12) 30-47.

<sup>35</sup> Tranholm-Mikkelsen (n 12).

<sup>36</sup> Niemann (n12) 47.

The early accounts of the neofunctionalist theory implied the existence of the cultivated spillover by recognising the importance of the role of the Commission in fostering further integration<sup>37</sup>. This concept has been upgraded in the revised neofunctionalist framework and modified to reflect the institutional developments in the EU, since Haas's first edition of the *Uniting Europe*<sup>38</sup>. Thus, in evaluating the concept of cultivated spillover, Niemann accounts for the roles of European Parliament, the European Court of Justice and Council Presidency in addition to that played by the Commission<sup>39</sup>. Some modifications to this approach have been made in this thesis, in the light of its unique nature.

Unlike to study conducted by Niemann<sup>40</sup>, which belongs in the realm of political science, this is a legal doctrinal analysis concerning interinstitutional dynamics in the EU. Therefore, chapters in this PhD examine how EU institutions cultivated integrative pressures through strategic litigation, legislative process, international treaty practice and policy-making. Furthermore, unlike the study conducted by Niemann, which has concerned the dynamics at different Treaty negotiations<sup>41</sup>, this PhD is focused on a different period, which commenced at the entry into force of the Treaty of Lisbon 2009. Thus, at the heart of this analysis are the EU institutions that possess formal powers to engage in the decision-making process in the CCP and, therefore, have the capability to shape the emerging common investment policy. As a consequence, the Council Presidency has been replaced in this evaluation with the Council of the European Union.

#### **1.4.2. The Dialectical Nature of the Process of Integration**

One of the main modifications of the revised neofunctionalist framework is the adoption of 'soft functionalism', as opposed to 'end of ideology' narrative, which had characterised early theoretical formulations and is visible in Haas's definition of regional integration quoted above<sup>42</sup>. The deterministic nature of the original account was derived from the belief that as the economic situation of societies improved, they would be more concerned with pursuit of wealth rather than with nationalist, socialist or religious ideals<sup>43</sup>. The assumption of the automatic occurrence of spillover, which ensured

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<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid 114-186.

<sup>40</sup> Niemann (n 12).

<sup>41</sup> Ibid.

<sup>42</sup> Haas (n 5), Lindberg (n 31) 10.

<sup>43</sup> Niemann (n 12) 16.

continuity of the process of integration and guaranteed unabated economic growth, also perpetuated the ‘end of ideology’ rhetoric<sup>44</sup>. The revised neofunctionalist theory of integration has dispensed with these ideas and, in a similar vein, this work does not take it for granted that the common investment policy will be successfully implemented and will result in further transfer of competences to the EU<sup>45</sup>. In fact, Chapter 5 poses a question, as to whether the process of integration in EU foreign relations has reached its limits.

The soft functionalism introduced in Niemann’s revised theoretical account and adopted in this thesis incorporates these doubts into the analytical framework through describing integration as a dialectical process that is affected by both positive and negative forces<sup>46</sup>. The disintegrative pressures featured only implicitly in early theoretical accounts and have not been incorporated into the analysis in a systematic manner<sup>47</sup>. This was one of the reasons why Haas’s early work could not deal, in a convincing way with de Gaulle and the empty chair crisis, for which the theory was criticised<sup>48</sup>. The revised theoretical framework rectifies this flaw, by assuming that conditions for further transfer of competences to the supranational centre are provided when the sum of pro-integrative pressures outweighs the countervailing forces<sup>49</sup>.

### 1.4.3. Countervailing Forces

The revised neofunctionalist framework has recognised different types of disintegrative pressures. Depending on their relative strength, countervailing forces may have either stagnating effect (preserving *status quo*), or work in the opposing direction (causing spillback, i.e. reversal of integration)<sup>50</sup>. The analysis in this PhD follows the approach adopted by Niemann and groups them together to accounts for their collective impact. Nonetheless, strong signals of sovereignty consciousness are highlighted, where their occurrence has been observed. The paragraph that follows briefly defines different categories of countervailing forces in the revised neofunctionalist framework and

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<sup>44</sup> Ibid 28.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid 47.

<sup>47</sup> Ibid; Tranholm-Mikkelsen (n 12) 16.

<sup>48</sup> Ibid; Rosamond (n 13) 248; Stanley Hoffmann, ‘Obstinate or obsolete? The fate of the nation-state and the case of Western Europe’ (1966) 95 *Daedalus* 862.

<sup>49</sup> Niemann (n 12) 47

<sup>50</sup> Ibid.

highlights their relevance for the analysis of the development of the common investment policy.

Sovereignty consciousness is identified as the strongest type of countervailing force and has been defined as a lack of disposition on the part of the Member States to yield competences to the supranational centre<sup>51</sup>. It is considered to stem from national traditions, ideologies, political culture and symbolism<sup>52</sup>. This type of negative pressure arises in relation to the exercise of the investment competence by the EU, because the implementation of a common solution requires the Member States to abandon their extensive networks of Bilateral Investment Treaties (BITs), which for many are a source of national pride. The second category of countervailing forces consists of domestic constraints and diversities<sup>53</sup>. As evaluated in Chapter 3, these issues are also relevant in this analysis, because Member States' past experience in investor-state arbitration indicates that there may be no consensus among them with regard to the objectives to be pursued through common investment policy. Negative integrative climate is the last variable recognised in this part of the analysis<sup>54</sup>. This factor is of importance, because the development of the EU investment policy has been taking place whilst the EU was faced with the economic crisis and the UK decided to leave the Union. In Chapter 5, it has been highlighted that the outcome of the UK's referendum on 23 June 2016 has increased the pressure from the Council to conclude Comprehensive Economic and Trade Agreement (CETA) using the mixed procedure and resulted in the Commission issuing a decision to that effect, before the CJEU ruled on the division of competence between the Union and the Member States.

#### **1.4.4. Countervailing Forces in this Study**

The scope of this study, which is limited to the development of the common international investment policy has allowed to reveal that actors may take on different roles in the process of integration, depending on a specific context within which they operate. Thus, they may be a source of pro-integrative pressures and cultivate functional spillover or may pose a threat of causing standstill or spillback in the expansion of the scope of EU action. In this context, findings of this study confirm the traditional characterisation of

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<sup>51</sup> Ibid 48.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid 48.

the Commission and the European Parliament, as actors who favour and pursue expansion of EU competences. However, the Council and the CJEU have emerged, in this thesis as sources of countervailing forces.

The role of the Council has been initially difficult to categorise. The problem that has arisen with regard to the positioning of the Council in the dialectical process of integration was derived from diverging effects of the Council's actions in the area of investment, since the entry into force of the Treaty of Lisbon 2009. In this context, in the Conclusions released in response to the Commission Communication outlining the general strategy for the new common policy<sup>55</sup>, the Council stated that it: '...fully supports the development of a common Policy Framework on Investment that establishes a level playing field for all EU investors in third countries and for investors from third countries in the EU'<sup>56</sup>. The Council, therefore, has enabled the Commission's actions in the sphere of investment, and as demonstrated in Chapter 2 this is known to create conditions for further integration in the CCP. However, a large number of cases concerning EU foreign relations that have been brought by the Council, since the entry into force of the Treaty of Lisbon 2009 are indicative of the fact that the institution generally does not support further transfer of competences in the sphere of foreign relations and rejects further supranationalisation of this policy sphere<sup>57</sup>.

The revised neofunctionalist theory has made similar observations with regard to the contribution of the Council Presidency; however, it has not explicitly categorised it as a source of countervailing forces in the CCP. The framework recognises that the Council Presidency has a capability to create pro-integrative pressures, in the light of its role as a mediator of consensus among the Member States<sup>58</sup>. However, empirical observations made during different Treaty negotiations highlighted that actions of the Council Presidency were not always directed at fostering integration. In this context, for example, Niemann notes that, during the IGC 1996-1997, the Irish Presidency presented a favourable position towards extension of the scope of the CCP, which gave negotiations some impetus<sup>59</sup>. During the same Conference, the Dutch Presidency, on the other hand,

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<sup>55</sup> Commission (n 5).

<sup>56</sup> Council, 'Conclusions on a Comprehensive European International Investment Policy' (2010) 3041<sup>st</sup> Foreign Affairs Meeting.

<sup>57</sup> See: Chapter 5.

<sup>58</sup> Ibid 148.

<sup>59</sup> Ibid.

was less supportive and presented a long list of exceptions and exclusion that eventually hindered further transfer of powers to the Union<sup>60</sup>.

What could explain these contradictions in the Council's position is the fact that the nature of the institution can be described as 'a unique blend of intergovernmental and supranational'<sup>61</sup>. In relation to this, Craig and de Búrca observe that the Council does not always act against the Commission, though it adopts a more cautious and intergovernmental approach<sup>62</sup>. Notwithstanding these considerations, the Council has always represented national interests of the Member States and has acted as their agent<sup>63</sup> and, as demonstrated in Chapter 5, in the overall balance, its actions post-Lisbon with regard to the area of EU foreign relations have had disintegrative effects. As a consequence, the Council has been categorised as source of countervailing forces this analysis.

The CJEU has been considered also as a source of countervailing forces in the analysis in this PhD, which is contrary to the traditional neofunctionalist depiction of the general role of the Court in the process on integration, by Stone Sweet, Burley and Mattli, or Weiler<sup>64</sup>. These accounts focus mainly on the foundational period, in which the Court established key constitutional doctrines, adding another dimension of functional pressures. This work recognises that the Court has played a central role in the process of EU integration. Nonetheless, when the contribution of the CJEU is analysed from a closer perspective, it can be observed that its impact on the development of the common investment policy, to date, departs from the general characterisation of the Court as a pro-integrative force. The major issue concerns the negative attitude of the CJEU towards external courts and tribunals. In Chapter 6, which evaluates this problem in detail, the strongly pluralistic approach that the Court adopts towards interaction of the EU legal order with international law, has been explained by the function of the Court as the guardian of the process of integration. In this context, the CJEU has traditionally held the view that any interference of an external judicial body with EU law is a threat to the

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<sup>60</sup> Ibid.

<sup>61</sup> Craig and de Búrca (n 27), 24.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

<sup>64</sup> Stone-Sweet (n 14); Burley and Mattli (n 14); Mattli and Slaughter (n 14); Joseph Weiler, 'The Transformation of Europe' (1990-1991) 100 Yale L.J. 2403, 2410.

integrity of the entire EU legal order, which was recently confirmed in the Opinion on the accession of the EU to the European Convention of Human Rights (ECHR)<sup>65</sup>.

Thus, from the perspective of the Court's function in the process of integration, a rejection of investor-state dispute resolution system on grounds of its incompatibility with EU law may be necessary to protect the integrity of the EU legal order. Though, the Court's behaviour could also be explained through a neofunctionalist assumption that as a self-interested actor, the CJEU does not want to surrender any part of its jurisdiction to an international court<sup>66</sup>. Nonetheless, a common investment policy is likely not to be implemented without an effective dispute resolution system. As a consequence, the Court's reluctance to open up on the influences of international law is considered to be an obstacle in the way towards the EU replacing Member States in the field of international investment, which is likely to hinder any future transfer of competences. In the light of this, the Court has been considered as a source of strong countervailing forces in the process of integration in the CCP post-Lisbon. Furthermore, it is recognised in the neofunctionalist framework that the Court enjoys wide discretion and can change the rules of the game<sup>67</sup>. The CJEU, therefore, holds the ultimate power to set the limits on the future development of the common investment policy and, as a consequence, further expansion of the CCP. For this reason, its contribution has been evaluated in the last chapter of this study.

### **1.5. Structure of the Analysis**

The interinstitutional conflict, which has been occurring in the area of the CCP, since the entry into force of the Treaty of Lisbon 2009 has been evaluated in the subsequent chapters of this study through the lens of the dialectical nature of the process of integration, in accordance with the assumptions of the revised neofunctionalism. Thus, within this analytical framework, the institutions are a source of either pro-integrative pressures, or countervailing forces. The examination of the contribution of EU institutions towards furthering integration in the CCP has been conducted in a manner that allows to account for the balance of positive and negative forces, to date.

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<sup>65</sup> Opinion 2/13 *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [2014] OJ C 65/2.

<sup>66</sup> Burnley and Mattli also suggest that sometimes the Court is motivated by self-interest. Burnley and Mattli (n 14).

<sup>67</sup> Niemann (n 12) 45.

The examination starts with outlining the new functional structure in the CCP, which has emerged since the entry into force of the Treaty of Lisbon 2009 in Chapter 2. Based on the past evolution of the CCP, the chapter evaluates conditions for further transfer of competences in this area. Chapter 3 accounts for the role of the Commission in the development of the common investment policy and evaluates efforts of the institution to cultivate further integrative pressures in the CCP. Chapter 4 considers the role of the European Parliament. Although, the Parliament is a new actor in the CCP, it has made contribution towards the supranationalisation of this area of EU competence, which is accounted for in that Chapter. Moreover, the Parliament has emerged as an important ally of the Commission, hence also a positive force in the dialectical process of integration in the CCP. Next, the analysis moves onto considering countervailing forces that stand in the way of the future development of the EU investment policy and jeopardise further expansion of the CCP. In this context, the CJEU and the Council are considered to be the main disintegrative forces and the impact of their actions on further integration in the CCP has been evaluated in Chapters 5 and 6. The balance between pro-integrative and countervailing forces is evaluated in the overall conclusions in Chapter 7.



## **Chapter 2.**

### **The Evolution of the Common Commercial Policy**

#### **2.1. Introduction**

As highlighted in the Introduction to this thesis the EU institutions utilise existing functional structures in order to affect the process of integration. Thus, with their actions, they frequently seek to exploit existing functional interdependencies, the incremental nature of the decision making and unintended consequences. The Treaty of Lisbon 2009 marked another milestone in the evolution of the CCP by adding FDI to the catalogue of the EU's competences and has created new functional pressures, which affect the interinstitutional dynamics.

The incremental nature of the development of the CCP aligns with assumptions of the neofunctionalist theory of integration. However, the incomplete transfer of competences in the field of investment, explored in detail in this chapter, poses challenges with respect to the implementation of the Union's new international investment policy. This area of EU competence emerges as a new battlefield for the interinstitutional conflict concerning the future of integration in the CCP.

The main aim of this chapter is to outline new functional structures which determine parameters for interinstitutional dynamics in the CCP, since the entry into force of the Treaty of Lisbon 2009. The chapter also examines past evolution of the CCP in order to determine the likely future of the dialectical process of integration in the sphere of investment.

#### **2.2. International Investment as the New Frontier of the CCP**

##### **2.2.1. The Union Becoming an Actor in International Investment**

The Treaty of Lisbon 2009 has substantially reformed the CCP by granting the EU exclusive powers in spheres of trade in services and intellectual property rights, as well as by adding FDI to the scope of Article 207 TFEU. These amendments have commenced another and most likely the final phase in the evolution of the CCP, as the recent extension of the Union's competences enables the EU to represent the Member States on the international scene with respect to all commercial matters. This has been a long-term goal

of the Commission<sup>1</sup>. However, as evaluated below, the Commission's quest for exclusive power in the sphere of external economic relations is far from being complete and requires further shift of loyalties from the Member States to the supranational centre.

Although the reference to FDI in Article 207 TFEU enables the EU's action in the field of international investment, it does not give the Union power to autonomously conclude deep and comprehensive trade agreements containing investment protection rules<sup>2</sup>. The capability gap arises due to the fact that the Union's new powers are expressly limited to FDI, whereas a broader concept of investment has been traditionally used to define the scope of investment protection treaties<sup>3</sup>. Whilst traditionally BITs have been enforced with an aim to protect FDI in a host State, the scope of these treaties covers wider range of transactions, consisting of direct and non-direct investment, which enables protection of FDI and all activities that are associated with it<sup>4</sup>. Notwithstanding the incomplete nature of the recent transfer of competences, the Commission has declared in the Communication<sup>5</sup>, which followed the entry into force of the new Treaty that the Union will use its new powers to develop common rules on protection of foreign investment.

This announcement has proven to be controversial and became a subject of a vivid debate<sup>6</sup>. The highly contentious nature of this issue can be attributed to the fact that matters concerning protection of international investment have always been an important

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<sup>1</sup> Arne Niemann, *Explaining Decisions in the European Union* (CUP 2006) 115.

<sup>2</sup> Opinion 2/15 *Free Trade Agreement between the European Union and the Republic of Singapore* [2017] OJ C239/3 (Opinion 2/15).

<sup>3</sup> Noah Rubins, 'The Notion of "Investment" in International Investment Arbitration' in Stefan Michael Kröll and Norbert Horn (eds), *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects, Studies in Transnational Economic Law, Volume 19* (Kluwer Law 2004), 283- 324; Paolo Vargiu, 'Beyond Hallmarks and Formal Requirements: a "Jurisprudence Constante" on the Notion of Investment in the ICSID Convention' (2009) 10 *Journal of World Investment and Trade* 753.

<sup>4</sup> Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (3<sup>rd</sup> edn, CUP 2010), 8-9.

<sup>5</sup> Commission, 'Towards a comprehensive European international investment policy' (Communication) COM (2010) 343 final.

<sup>6</sup> Marc Bungenberg, 'The Division of Competences between the EU and Its Member States in the Area of Investment Politics' in Marc Bungenberg (ed), *International Investment Law and EU Law* (Springer-Verlag 2011) 34; Markus Krajewski, 'The Reform of the Common Commercial Policy' in Anrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU Law After Lisbon* (OUP 2012) 302; Julien Chaisse, 'Promises and Pitfalls of the European Union Policy on Foreign Investment – How Will the New EU Competence on FDI Affect the Emerging Global Regime?' (2012) 15 *JIEL* 51; Wenhua Shan and Sheng Zhang, 'The Treaty of Lisbon: Half Way toward a Common Investment Policy' (2011) 21 *EJIL* 1049; Anna De Luca, 'New Developments on the Scope of the EU Common Commercial Policy under the Lisbon Treaty: Investment Liberalisation vs. Investment Protection?' in Karl Sauvant (ed), *Yearbook on International Investment Law & Policy 2010 -2011* (OUP 2012), 170; Federico Ortino and Piet Eeckhout, 'Towards an EU Policy on Foreign Direct Investment' in Andrea Biondi, Piet Eeckhout and Stephanie Ripley (eds), *EU Law After Lisbon* (OUP 2012) 315.

aspect of foreign policies of the Member States<sup>7</sup>. Since 1959, international flow of FDI has been regulated through extensive networks of Bilateral Investment Treaties (BITs)<sup>8</sup> and prior to the entry into force of the Treaty of Lisbon 2009, the EU Member States concluded over 1500 such agreements<sup>9</sup> independently of the institutions of the Union.

The recent amendments have precluded completely autonomous action by the Member States in the area of international investment, albeit their activity in this sphere will continue until the EU establishes itself as a credible actor in the field. It is opined in this study that this is going to be a long-term process, as it requires that the EU exercises exclusive competences in the sphere of international investment, hence a further transfer of loyalties from the Member States to the supranational centre is necessary<sup>10</sup>. Nonetheless, the continued activity of the Member States in the area is undertaken under a close scrutiny of the Commission<sup>11</sup>. Although this opens up new opportunities for the supranational institution to cultivate pro-integrative pressures, it also heightens feelings of sovereignty consciousness among the Member States, which fuels the interinstitutional conflict between the Commission and the Council and affects the pace of the process of integration in the CCP<sup>12</sup>.

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<sup>7</sup> Nikos Lavranos, 'In Defence of Member States' BITs Gold Standard: The Regulation 1219/2012 Establishing a Transitional Regime for Existing Extra-EU BITs – A Member State Perspective' (2012) 10 Transnational Dispute Management <[www.transnational-dispute-management.com](http://www.transnational-dispute-management.com)> accessed 06 January 2018.

<sup>8</sup> The first bilateral investment treaty was concluded between Germany and Pakistan in 1959. The number of BITs has significantly increased in 1990s. Sornarajah (n 4) 172;

<sup>9</sup> UNCTAD, Investment Policy Hub: International Investment Agreements Navigator <<http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20%28IIA%29/Country-specific-Lists-of-BITs.aspx>> accessed 26 January 2018.

<sup>10</sup> Regulation 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries [2012] OJ L351/40 (Transitional Arrangements Regulation).

<sup>11</sup> Commission, 'List of the bilateral investment agreements referred to in Article 4(1) of Regulation (EU) No 1219/2012 of the European Parliament and the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries' [2013] OJ C131/2; Commission, 'List of the bilateral investment agreements referred to in Article 4(1) of Regulation (EU) No 1219/2012 of the European Parliament and the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries' [2014] OJ C169/1; Commission, 'List of the bilateral investment agreements referred to in Article 4(1) of Regulation (EU) No 1219/2012 of the European Parliament and the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries' [2015] OJ C135/1; Commission, 'List of the bilateral investment agreements referred to in Article 4(1) of Regulation (EU) No 1219/2012 of the European Parliament and the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries' [2016] OJ C149/1; Commission, 'List of the bilateral investment agreements referred to in Article 4(1) of Regulation (EU) No 1219/2012 of the European Parliament and the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries' [2017] OJ C147/1.

<sup>12</sup> This dynamic has been evaluated in Chapter 4.

### 2.2.2. Future of Integration in the CCP from the Perspective of Neofunctionalism

As explained in greater detail in the Introduction to this thesis, the neofunctionalist theory has defined integration among states as a transfer of national loyalties to the supranational centre<sup>13</sup>. In evaluating the emergence of the common international investment policy from the perspective of the neofunctionalism, it is apparent that the Commission's activity on the international scene provides a mask for further shift of loyalties in investment, which is necessary to ensure effective action by the Union. Since, the current division of competences requires involvement of the Member States in the conclusion of international treaties that cover investment protection provisions (hereinafter investment treaties)<sup>14</sup>, such an arrangement, as demonstrated in the subsequent chapters, undermines the EU external action in this area.

Despite the fact that the amendments introduced in the Treaty of Lisbon 2009 have not put the Union in the optimal position to conclude international investment agreements, from the perspective of the neofunctionalist theory the latest Treaty revision has made a substantial progress in the CCP. In its early formulations, Ernst Haas described the process of integration using terms such as: incrementalism, gradualism and indirection<sup>15</sup>. He has emphasised the primacy of the “incremental decision making over grand design”<sup>16</sup> and believed that “the imperfections of one treaty and one policy would give rise to re-evaluations that would lead to the new commitments and new policies moving farther along the road of unification”<sup>17</sup>. Thus, according to the assumptions of the neofunctionalist theory of integration, an imprecise Treaty drafting creates gradually pressures for further Treaty amendments<sup>18</sup>. In the revised, neofunctionalist framework this constitutes a structural component that can be exploited by the actors in order to secure further transfer of competences<sup>19</sup>. This dynamic makes it difficult for the Treaty

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<sup>13</sup> Ernst Haas, *The Uniting of Europe: Political, Social, and Economic Forces 1950-1957* (Stanford University Press 1968) 16; Leon Lindberg, *The Political Dynamics of European Economic Integration* (Stanford University Press 1963) 6.

<sup>14</sup> Opinion 2/15 (n 2).

<sup>15</sup> Haas (n 13) xix.

<sup>16</sup> Niemann A, Schmitter P C, ‘Neofunctionalism’ in Antje Wiener, Thomas Diez, *European Integration Theory* (2nd edn, OUP 2009), 48.

<sup>17</sup> Haas (n 12) XX.

<sup>18</sup> Wayne Sandoz and Alec Stone Sweet, ‘Neo-functionalism and Supranational Governance’ in Erik Jones, Anand Menon and Stephen Weatherill (eds), *The Oxford Handbook of the European Union* (OUP 2012), 24.

<sup>19</sup> Niemann (n 1) 156.

drafters to know *ex ante* consequences of their decisions, which as highlighted in Chapter 5 can be a source of countervailing forces.

The latest Treaty amendments created such structural pressures in the area of investment. The incomplete nature of the transfer of competences in the sphere of investment together with the negotiating history do not provide strong evidence that the Member States intended for the EU to succeed them as actors in the field of international investment. Many members of the Convention, which led to the final draft of Article 207 TFEU proposed to strike out reference to FDI<sup>20</sup>. Some, members sought a clarification that inclusion of FDI was intended only to enable to EU to conduct negotiations at the WTO, rather than remove the right of the Member States to engage in BIT negotiation<sup>21</sup>. This opinion seems to persist, as in the recent Opinion 2/15, the Council and few Member States defended an argument that only investment protection specifically linked to international trade should be within the ambit of the Union's competences<sup>22</sup>. The stance taken by the Member States confirms the initial assertions made in the debate concerning the scope of the Union's powers, that the reference to FDI was included in Article 207 TFEU only in order to enable the Union's completely autonomous action at the WTO<sup>23</sup>.

Nonetheless, the unintended consequence of the transfer of FDI have had the opposite effect to the intentions of the Member States. This amendment has locked them into a functional structure leading towards full transfer of competences in investment to the EU. Despite the lack of clarity concerning the intentions of the Treaty drafters, the Commission has gone ahead with developing the EU's international investment policy immediately after the entry into force of the Treaty of Lisbon 2009, leaving the Member States with little choice but to acquiesce to it. Since then the EU has made considerable steps forward in exercising the new competence in negotiations with, Singapore, Canada and Vietnam and started other initiatives to improve the system for protection of foreign investment, evaluated in greater detail in Chapter 3.

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<sup>20</sup> They included, for example: M. Ernâni Lopes and M. Manuel Lobo Antunes, Voggenhuber, MacCormick, Wagoner, Lichtenberger, Nagy, de Villepin, Joschka Fischer, Haenel, Baditer, Hain, Lamassoure, Lequiller, Roche, Voggenhuber, Wagoner, Lichtenberger, Nagy. The European Convention <<http://european-convention.europa.eu/EN/amendments/amendments3dd9.html?content=866&lang=EN>> accessed 26 January 2018.

<sup>21</sup> See for example amendment proposed by Hain The European Convention <<http://european-convention.europa.eu/docs/Treaty/pdf/866/Art23Hain.pdf>> accessed 26 January 2018.

<sup>22</sup> Opinion 2/15 (n 2) para 26.

<sup>23</sup> Markus Krajewski (n 6) 303-304.

As is gradually revealed in this thesis, the non-exclusive nature of the Union's competences in the sphere of international investment is a significant hindrance to the implementation of the common international investment policy. However, it is also proposed that the continued exercise of external powers in this sphere by the EU could eventually create sufficiently strong functional pressure for the full transfer of competences to the institutions of the Union. The integration in EU external relations has often occurred indirectly through difficult political compromises achieved during Treaty negotiations, the Commission's activity on the international arena and judicial decisions. This thesis, therefore, proposes that the trend identified in the past evolution of the CCP is a guide to the likely future developments in relation to the investment competence.

The past experience of integration in the CCP, viewed through the lens of neofunctionalism, suggests that the process of the EU obtaining exclusive powers in the area of investment may be a lengthy one. The theory has described the process of integration as slow and gradual and these have been characteristics of the evolution of the CCP to date<sup>24</sup>. Changes in the spheres of trade in services and commercial aspects of intellectual property rights, explored in a greater detail below, exemplify this. In this context, the subsequent section evaluates the evolution of the CCP from the perspective of the neofunctionalist theory of integration in order to illuminate the likely future course of developments in the sphere of investment, which is the new frontier for the Union's oldest policy.

### **2.3. The Neofunctionalist Evolution of the CCP**

In the light of the theoretical considerations in the preceding part, the section below analyses historical developments in the CCP from the perspective of the neofunctionalist theory. Firstly, it outlines the slow and gradual process of the Treaty reform in this area. Secondly, it appraises the role of judicial decisions in the evolution of the Union's competences in this field. It is proposed that parallels can be drawn between the integrative pressures that existed in the spheres of trade in services and intellectual property and those that are currently observed with regard to investment. Therefore, the trend identified in relation to the process that had led to the enlargement of the Union's

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<sup>24</sup> Niemann (n 1) 114- 186.

exclusive competences, could provide useful guidance with respect to the likely future pace and direction of the expansion of the Union's powers in the area of investment.

### **2.3.1. Treaty Negotiations**

The gradual process of expansion of the EU's competences into the spheres of intellectual property and trade in services exemplifies that integration in the area of the CCP displays the neofunctionalist characteristics. The evolution of the CCP also indicates that the process of integration in this area, has been dialectical in nature, i.e. shaped by both positive and negative forces that have been embodied by actions of the EU institutions<sup>25</sup>. Therefore, the journey towards broad and supranational CCP has been slow and incremental. In this context, only partial transfer of competences with regard to investment in the Treaty of Lisbon 2009 is consistent with characteristics displayed by the past developments in the CCP. As a consequence, the fully supranational character of this policy sphere still remains unattained.

The quest for widening the scope of the CCP had been underway during the IGC preceding the signature of the Treaty of Maastricht 1993. Already then, the Commission proposed ambitious changes that would have enabled the Community to exercise comprehensive powers in the sphere of external economic relations, including: trade in goods, trade measures relating to services, intellectual property, investment, establishment and competition<sup>26</sup>. In this context, it can be observed that since the early years of the Union, the Commission's goal was to obtain exclusive powers in all spheres concerning external commercial relations and, since then, its actions in this sphere have been directed towards creating strong pro-integrative pressures for attainment of this goal. The Commission's first attempt to expand the scope of the CCP was largely unsuccessful. From the perspective of the neofunctionalist theory of integration, this is indicative of the fact that the functional pressures for transfer of competences to the EU were not perceived as strong by the Member States, who, as a result, were not persuaded to shift their loyalties to the supranational centre<sup>27</sup>.

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<sup>25</sup> Ibid 50-52.

<sup>26</sup> Arne Niemann, 'The Common Commercial Policy: From Nice to Lisbon' in Finn Lauren (ed), *The EU's Lisbon Treaty: Institutional Choices and Implementation* (Ashgate Publishing 2012), 207.

<sup>27</sup> Piet Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations*, (OUP 2004), 25.

Soon after the entry into force of the Treaty of Maastricht in 1993, the CJEU had ruled on the scope of the Union's competences with respect to conclusion of the WTO agreements<sup>28</sup>. Although the EU was not considered to have powers to conclude all agreements without the Member States, the judgment fuelled the debate about the scope of the CCP<sup>29</sup>. Further amendments, although modest<sup>30</sup>, have been introduced in the Treaty of Amsterdam 1999 and the Treaty of Nice 2003. The earlier Treaty changes enabled the Council acting unanimously and after consulting the European Parliament, to extend the scope of the commercial policy to cover agreements on services and intellectual property<sup>31</sup>. The later changes, arguably more progressive<sup>32</sup>, transferred explicit powers to negotiate and conclude agreements concerning trade in services and trade related aspects of intellectual property rights to the EU<sup>33</sup>. However, due to the number of reservations to the decision-making procedure concerning certain aspects of the CCP, it became difficult to find consensus on the interpretation and application of these complex rules. Therefore, these last amendments, although inspired academic debates<sup>34</sup>, brought no significant changes to previously established practices and resulted in continued prevalence of the mixed procedure for conclusion of EU agreements that fall within the scope of the CCP<sup>35</sup>.

Nonetheless, all of the consecutive Treaty negotiations were gradually and indirectly moving integration in the sphere of the CCP forward, through (sometimes very) incremental transfers of powers to the supranational centre. Already, during the Treaty of Amsterdam negotiations, some Member States recognised the need to include services and intellectual property rights in the scope of the CCP. However, fear that such a development would create functional pressure for further internal harmonisation, resulted in only a minor step forward in this direction<sup>36</sup>. This could also be the path of the evolution of the EU competences in the sphere of investment, as at the moment the Member States display scepticism towards replacement of their BIT programmes with

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<sup>28</sup> Opinion 1/94 *Re WTO Agreement* [1994] ECR I-5267.

<sup>29</sup> *Ibid* para 105.

<sup>30</sup> Niemann (n 1) 207.

<sup>31</sup> Treaty of Amsterdam amending the Treaty of European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C340/1, para 20.

<sup>32</sup> Eeckhout (n 27) 49.

<sup>33</sup> Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts [2001] OJ C80/1, Art. 133(5).

<sup>34</sup> Christoph W Hermann, 'Common Commercial Policy After Nice: Sisyphus Would Have Done a Better Job' (2002) 39 CMLR 7.

<sup>35</sup> Eeckhout summarises Amsterdam and Nice amendments in these words: "... the Treaty drafters could have spared themselves the trouble"; Eeckhout (n 27) 53.

<sup>36</sup> Niemann and Schmitter (n 16).



the common investment policy, nonetheless their enable the Union's actions in investment through granting their approval for the opening of investment negotiations.

Despite the fact that the sovereignty consciousness, recognised as one of the strongest countervailing forces within the neofunctionalist framework, curtailed the extent of the positive developments in the CCP during Amsterdam negotiations, the outcome of the IGC was a catalyst for further negotiations at Nice, which in theory gave rise to more progressive set of rules. The difficult political compromise achieved at Nice resulted in a high level of complexity in the drafting of the new scope of the CCP and in practice proved not to be a significant step forward. Notwithstanding the slow pace, the Union was moving closer towards increased levels of integration in the area of the CCP. Eventually, the clarity with respect to the delineation of competences in relation to trade in services and intellectual property was provided in the Treaty of Lisbon 2009, which included these two spheres within the scope of the EU's exclusive powers<sup>37</sup>. Thus, if further integration in the CCP follows a similar path it is likely that the process of its supranationalisation will not be completed at the next treaty negotiations.

### **2.3.2. The Likely Future Course of the Development of the CCP**

The developments in the CCP in relation to trade in services and intellectual property rights align with the neofunctionalist description of integration as a long-term process, rather than a series of isolated events. To that end, the Treaty of Lisbon 2009, on the one hand, completed part of the process in relation to two abovementioned spheres of external relations and, on the other hand, has started a new constitutional development. The addition of FDI to the scope of Article 207 TFEU has created new ambiguities in the sphere of the CCP, which within the neofunctionalist framework is a precondition for further integration. In accordance with the theoretical assumptions, it is now in the hands of the institutions to cultivate pro-integrative pressures that exist within these functional structures in order to secure further expansion of the EU's powers. This enquiry starts at the time of transfer of investment competences to the EU and evaluates impact of the interinstitutional dynamics in the post-Lisbon era on the future integration in the CCP.

If the evolution of the CCP is viewed from a historical perspective, it can be observed that granting to the Union of only partial competences in a certain area of foreign relations

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<sup>37</sup> Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 (TFEU), Art 207(1).

creates conditions for further integration and eventually results in their complete shift to the supranational centre by merely enabling actions of EU institutions. The Treaty of Lisbon 2009 did not in a 'material sense' extend the Union's competence to areas of trade in services and the commercial aspects of intellectual property rights.<sup>38</sup> This constitutional change had taken effect when the EU for the first time signed a mixed agreement covering these two spheres, which were previously governed only by the Member States. Thus, the latest amendments have not established the EU as a new actor in areas of trade in services and intellectual property rights<sup>39</sup>, in practice they have just turned the Union into a more efficient one. A holistic evaluation of the evolution of the CCP uncovers that the Treaty of Lisbon 2009 has begun a new stage in the process of integration in the area of external relation by allowing the EU to emerge as an actor in the sphere of investment protection.

Therefore, the discussion inspired by the negotiating history of the Treaty of Lisbon 2009 whether the Union has a legitimate power to develop a policy on investment protection can be considered as academic<sup>40</sup>. In practice, the Commission has started to establish itself as an actor in the field of international investment immediately after the reference to FDI appeared in the Article 207 TFEU, by commencing negotiations with Canada, Singapore, Vietnam and other third country partners. The signature of Comprehensive Economic and Trade Agreement (CETA) with Canada confirms that there is *de facto* acceptance by the Member States of the Union's new investment powers in the area of international investment protection<sup>41</sup>. Although they remain suspicious about the Commission's actions in the field, as manifested by the refusal to grant provisional application the EU's first investment chapter<sup>42</sup>. In the neofunctionalist framework the Commission's actions can be described using the concept of cultivated spillover, hence they create an important pro-integrative force in the process of integration in the CCP.

The incomplete transfer of competences in the sphere of investment has, however, fuelled interinstitutional conflict between the Council and the Commission with regard to the

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<sup>38</sup> Ibid. Piet Eeckhout, *External Relations of the European Union* (2<sup>nd</sup> edn, OUP 2014), 18.

<sup>39</sup> Ibid 50.

<sup>40</sup> Krajewski (n 6).

<sup>41</sup> Council, 'The Council Decision on the signing on behalf of the European Union of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States on the other part', WTO 194 Services 19 FDI 15 CDN 11.

<sup>42</sup> Council, 'Council Decision on the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part' 10974/16 WTO 196 Services 21 FDI 17 CDN 13.

scope the Union's competence, which culminated in the Opinion 2/15<sup>43</sup>. Though the resolution of this issue by the CJEU has not affected the EU's new position as an actor in international investment, it undermined the effectiveness of its actions. For the foreseeable future, mixed procedure will have to be used for conclusion of investment treaties, a unanimous action by the Member States will be required, as opposed to the qualified majority vote applicable in instances in which the EU exercises its exclusive competences<sup>44</sup>. In the light of the dialectical nature of EU integration, such an outcome constitutes a countervailing force. As the process continues in the post-Lisbon era, further transfer of investment competences depends on the negative pressures being outweighed by the positive ones<sup>45</sup>.

## **2.4. The Role of Judicial Decisions in the Expansion of the CCP**

The uncertainty relating to the precise definition of the scope of the Union's competences has always been the central issue in the interinstitutional conflict concerning the CCP. It has fuelled considerable amount of litigation, which has been one of the forces that affected the process of integration in the area of the CCP. In this context, the CJEU has emerged, alongside of the Commission and the Council, as an important actor in the process of integration in the CCP and its role has been recognised in the revised neofunctionalist framework<sup>46</sup>.

### **2.4.1. The Court's Early Opinions on the Scope of the CCP**

The debate about the delineation of competences between the Union and its Member States in relation to the CCP started with the Opinion 1/75, concerning the Union's powers to conclude OECD Understanding on the Local Cost Standard<sup>47</sup>. In this Opinion, the CJEU established the structure for future debate concerning the CCP by considering two basic elements of the Union's commercial policy, namely scope and the nature of the power<sup>48</sup>. In the light of the analysis in the preceding section, it is proposed that finding that a particular area falls even partially within the scope of the Union's competences creates conditions for further integration. The nature of the Union's powers determines

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<sup>43</sup> Opinion 2/15 (n 2).

<sup>44</sup> TFEU, Art 218.

<sup>45</sup> Niemann (n 1) 156.

<sup>46</sup> Ibid 144.

<sup>47</sup> Opinion 1/75 *Re Understanding on a Local Cost Standard* [1975] ECR 1359 (Opinion 1/75).

<sup>48</sup> Marise Cremona, 'Defining Competence in EU External Relations: Lessons from the Treaty Reform Process' in Alan Dashwood and Marc Maresceau, *Law and Practice of EU External Relations* (CUP 2008).

the extent of the integration and the effectiveness of the Union's external action, which is an important factor in the context of cultivating further integrative pressures.

In its first Opinion on the matter, the CJEU construed the scope of the CCP in a very flexible manner. It stated that “sometimes agreements are concluded in execution of a policy fixed in advance and sometimes that policy is defined by the agreement themselves”<sup>49</sup>. This was consistent with the general view of the commercial policy expressed by the Court, which characterised it as a dynamic tool in the hands of the Community, developing progressively and gradually in response to the current trends in international trade<sup>50</sup>. Such an approach was considered to significantly facilitate the gradual extension of the Union's competences in the field and positioned the Court as a source of positive forces in the process.

The Court upheld the same expansive approach to the definition of the scope of the CCP in the next Opinion it had to deliver on the subject<sup>51</sup>. Opinion 1/78 considered the International Agreement on Natural Rubber negotiated at the forum of the United Nations Conference on Trade and Development (UNCTAD). Similarly, in this case the Commission asked whether the Union had an exclusive competence to enter into this agreement on behalf of the Member States. In this Opinion, the Court suggested that Article 113 EEC (207 TFEU) had merely an indicative value<sup>52</sup>, as it contained a ‘non-exhaustive’ enumeration “of the subjects covered by the commercial policy”<sup>53</sup>. Furthermore, it also continued to emphasise the direct link between the developments in the international trade and the progressive expansion of the Community's commercial policy. It stressed that an effective CCP cannot be restricted to traditional aspects of the trade policy, such as a mere removal of tariff barriers and should include more elaborate measures which facilitate the development of the world market, in line with the international trends<sup>54</sup>. The Court's approach in this Opinion is consistent with the neofunctionalist depiction of the expansive nature of integration as propelled by the actors.

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<sup>49</sup> Opinion 1/75 (n 47) para 24.

<sup>50</sup> Ibid para 25; Eeckhout (n 27) 13.

<sup>51</sup> Opinion 1/78 *Re International Agreement on Natural Rubber* [1979] ECR 2871 (Opinion 1/78).

<sup>52</sup> Panos Koutrakos, “‘I Need to Hear You Say It’: Revisiting the Scope of the EC Common Commercial Policy” (2003) 22 YEL 407, 408.

<sup>53</sup> Opinion 1/78 (n 51) para 45.

<sup>54</sup> Ibid.

In the early Opinions, the CJEU also presented a flexible view about the effects of the objectives of the CCP on its scope<sup>55</sup>. Since the inception of the Union, one of the main functions of the CCP was trade liberalisation, which was addressed by the Court in the Opinion 1/75<sup>56</sup>. In this context, the CJEU highlighted that specific aims of the CCP did not limit the Union's capability to expand its commercial policy. In Opinion 1/75, the Court stated that the original aims of trade liberalisation should not preclude the Union from concluding agreements other than those that deal with trade tariffs<sup>57</sup>. Thus, in its initial cases the Court used all aspects of the Treaty structure to foster wide interpretation of the Union's external powers.

Koutrakos proposed that the broad and progressive approach of the Court in the early Opinions on the delineation of competences between the Union and the Member States were products of political tensions occurring at the time.<sup>58</sup> They were the Court's attempt to alleviate negative effects of the Luxembourg Comprise and to end the process of stagnation, which had manifested itself in the slow decision-making in the Council<sup>59</sup>. Therefore, in the first Opinions, the Court had acted as an agent of integration. Niemann suggests that with respect to the delineation of competences in the CCP, these days are long gone, because of greater visibility of the Court's actions and increased political and academic scrutiny<sup>60</sup>. In such circumstances law can no longer provide a mask for further integration, as effectively as it did in the past.

Increased scrutiny of the Court's actions is a factor in the post-Lisbon era, which as highlighted in the subsequent section affects the CJEU's approach to the division of competences in the CCP and limits the pace of its expansion. Since the Treaty of Rome 1958, the list of objectives pursued through the CCP has grown considerably. The policy has been brought within the scope of the general objectives of the EU external action<sup>61</sup>. Therefore, trade and investment agreements concluded by the EU must also pursue "democracy, rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, equality and solidarity, and respect for

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<sup>55</sup> Ibid; Opinion 1/75 (n 47).

<sup>56</sup> Opinion 1/75 (n 47) para 44.

<sup>57</sup> Ibid 1363.

<sup>58</sup> Koutrakos (n 52) 409.

<sup>59</sup> Ibid.

<sup>60</sup> Niemann (n 1) 145-146.

<sup>61</sup> TFEU, Art 205; Consolidated Version of the Treaty on the European Union [2016] OJ C202/13 (TEU), Chapter I, Title V.

the United Nations Charter on international law”<sup>62</sup>. The EU is also required to seek multilateral solutions to common problems, which as evaluated in Chapter 3 has been used by the Commission to cultivate further integrative pressures<sup>63</sup>. Notwithstanding these ancillary aims that are intended to increase coherence of the EU external action, trade liberalisation continues to be primary objectives of the CCP<sup>64</sup>.

In the light of this, a narrow reading of the scope of the EU’s investment competence post-Lisbon was proposed in the initial academic debates<sup>65</sup>. Such an interpretation in the context of Article 207 TFEU was to enable the EU to undertake only the negotiations concerning trade related aspects of international investment, as well as foreign direct investment liberalisation at the WTO and not to conclude investment agreements with an intention to replace the existing networks of Member States’ BITs<sup>66</sup>. This interpretation of the EU’s new FDI powers was to some extent echoed by the Member States in the Opinion 2/15<sup>67</sup>. Although the CJEU was not convinced by this reasoning, it also did not follow its early expansive interpretation of the scope of the CCP<sup>68</sup>. Thus, as evaluated below, in the post-Lisbon era the Court plays a limited role in relation to fostering pro-integrative pressures for further transfer of competences in the sphere of the CCP.

#### **2.4.2. The Court’s Later Opinions on the Scope of the CCP**

In the face of the Court’s early expansive approach to the question of the division of competences, a lack of precise specification of the extent of the Union’s commercial policy has been highly criticised, particularly in the light of the exclusive nature of the power<sup>69</sup>. This issue, however, was addressed in Opinion 1/94, concerning the capacity of the Union to conclude the WTO Agreement and its Annexes on behalf of the Member States<sup>70</sup>. In this instance, the Court dispensed with its initially activist stance towards the Union’s powers to conclude international economic agreements. In Opinion 1/94, the CJEU adopted an interpretation of the scope of the CCP that closely reflected the will of the Treaty drafters and was not prepared to read into it matters, which, at the time, were

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<sup>62</sup> TEU, Art 21.

<sup>63</sup> Ibid.

<sup>64</sup> TFEU, Art 206.

<sup>65</sup> De Luca (n 6) 174; Ortino and Eeckhout (n 6) 313; Krajewski (n 6).

<sup>66</sup> Krajewski (n 6) 304.

<sup>67</sup> Opinion 2/15 (n 2) para 25.

<sup>68</sup> Ibid paras 225-256.

<sup>69</sup>Youri Devuyt, ‘The EC’s Common Commercial Policy and the Treaty on European Union: An Overview of the Negotiations’ (1992) 16 World Competition – Law and Economics Review 67, 71.

<sup>70</sup> Opinion 1/94 (n 28) para 14.

not expressly mentioned, such as trade in services or commercial aspects intellectual property rights<sup>71</sup>. The Court maintained such an approach ever since.

In Opinion 1/94 the CJEU took a significant step back from its initial interpretation of the scope of the CCP as having capability to expand and dynamically adapt to the changing realities of the global commerce<sup>72</sup>. In relation to the WTO agreements, the Court concluded that the Community had the exclusive competence only with respect to Multilateral Agreement on Trade in Goods (GATT)<sup>73</sup>, and that the power to enter into General Agreement on Trade in Services (GATS) and the Agreement on Trade Related Intellectual Property Rights (TRIPS) was to be shared between the Community and its Member States<sup>74</sup>. This change in approach has significantly curbed the expansive dynamism in the process of integration in the CCP.

In relation to GATS, the Court conducted a detailed examination of the nature of international trade in services and concluded that only the cross-frontier supply of services (GATS Mode 1) was covered by the commercial policy<sup>75</sup>. Other modes of supply specified in the international agreement, such as: the consumption abroad, the commercial presence and the presence of natural persons, did not fall within the scope of the commercial policy<sup>76</sup>. In relation to TRIPS the Court ruled that the intellectual property rights could not have been considered as an issue specific to the international trade and for that reason they were not read into the scope of the CCP<sup>77</sup>. Consequently, the Community was not capable to conclude these two agreements exclusively. They were signed as mixed agreements and the competence in matters concerning WTO was shared between the Community and its Member States.

Opinion 1/94 was a milestone in the development of the Union's commercial policy because it highlighted that there were limits to the expansion of CCP. It appears that with this Opinion, the Court was responding to the academic criticism, proving that the scope of the external commercial policy was not ill-defined and capable of encompassing any measures<sup>78</sup>. As a consequence, the pace of integration in this area of the Union's

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<sup>71</sup> Ibid paras 47, 48, 53, 103.

<sup>72</sup> Ibid para 14.

<sup>73</sup> Ibid para 22.

<sup>74</sup> Ibid para 110.

<sup>75</sup> Ibid paras 45-46.

<sup>76</sup> Ibid paras 45-46.

<sup>77</sup> Ibid para 57.

<sup>78</sup> Koutrakos (n 52) 423.

competence was curtailed, which was visible in later cases before the CJEU. In Opinion 2/00, for example, the Court rejected an expansive interpretation of the scope of the CCP proposed by the Commission and ruled that the Cartagena Protocol of Biosafety was not within the remit of the commercial policy, as it was mainly an environmental measure<sup>79</sup>.

In the view of Emiliou, Opinion 1/94, similarly to the Court's early case law reflected the political climate prevailing at the time. The ruling came when the Member States started to express concerns about their decreasing sovereignty in core areas such as the international treaty-making<sup>80</sup>. As a consequence, the CJEU took a step back in prioritising the aim of integration over other considerations, as it was no longer prepared to "tread on the toes of the Member States without their explicit consent"<sup>81</sup>. In this context, the revised neofunctionalist framework has recognised that politicisation of EU foreign relations has limited the Court's role in the process of integration in the CCP<sup>82</sup>.

Nonetheless, the Court's reasoning in the Opinion 1/94 did not preclude the Union from representing Member States in international relations concerning matters of trade in services and commercial aspects of intellectual property rights. Moreover, because of their shared nature, EU competences in these spheres were allowed to dynamically expand, however with some degree of an express consent from the Member States<sup>83</sup>. The existence of the doctrine of implied powers has been acknowledged in the revised neofunctionalist framework as an important tool that facilitated gradual and dynamic development of the CCP, in spite of the Member States' reluctance<sup>84</sup>. The use of the mixed procedure was required for conclusion of the WTO agreements because at the time of the ruling common rules did not exist in all spheres covered by the WTO agreements<sup>85</sup>. This gave the Member States high degree of control over the EU's external action, but the continued international action of the EU at the WTO overtime created strong functional pressures, which eventually led to the extension of the CCP.

### **2.4.3. The Divisions of Competences in Investment after the Treaty of Lisbon 2009**

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<sup>79</sup> Opinion 2/00 *Re Cartagena Protocol on Biosafety* [2001] ECR I-9713.

<sup>80</sup> Nicholas Emiliou, 'The Death of Exclusive Competence?' (1996) 21 EL Rev 294, 294.

<sup>81</sup> Ibid 311.

<sup>82</sup> Niemann (n 1) 145-146.

<sup>83</sup> Case 22/70 *Commission v Council (ERTA)* [1971] ECR 263.

<sup>84</sup> Niemann (n 1) 116.

<sup>85</sup> Opinion 1/94 (n 28) paras 89, 105.



In relation to the new constitutional developments in the CCP brought by the Treaty of Lisbon 2009, similarly to the Opinion on trade in services and intellectual property rights evaluated above, the CJEU ruled that the Union does not enjoy exclusive powers over the entire field of international investment<sup>86</sup>. In the Court's view, this was the only outcome that respected the will of the Treaty drafters who chose to expressly limit the EU's competences to the area of FDI in Article 207 TFEU<sup>87</sup>. Thus, in spite of the initial expansive interpretation, the latest Opinion follows a more measured approach adopted by the Court in Opinion 1/94. However, since the conclusion of the WTO agreement, the legal framework for resolving questions concerning Union's competences has changed.

One of the amendments, has been the codification of the Court's case law on the implied competences in Article 3(2) TFEU<sup>88</sup>. In the Opinion on the division of competences in investment post-Lisbon, the Commission has tried to exploit this new functional structure by arguing that conclusion of investment agreements affects common rules on free movement of capital in the TFEU<sup>89</sup>. Consequently, based on the new rules concerning implied powers, the Commission proposed that the Union should enjoy exclusive competence over all types of investment<sup>90</sup>. The Court disagreed with the Commission's argument and reiterated limits of the doctrine of implied powers in ensuring parallelism between internal and external competences of the Union. In this context, the CJEU reaffirmed that only provisions of secondary EU law can be considered as 'common rules' for the purpose of Article 3(2) TFEU, contrary to the Commission's contention<sup>91</sup>. From the perspective of the neofunctionalist theory, the Court has acted within the legal limits it previously established and did not perceive the pro-integrative pressures cultivated by the Commission as strong enough to expand them.

Nonetheless, similarly to Opinion 1/94 and contrary to the narrow interpretation of the FDI competence highlighted above, the CJEU's ruling in Opinion 2/15 have not precluded Union's action in the area of international investment. The Court found on the basis of Article 216 that the EU's action was necessary for the purpose of achieving the objectives specified in the Treaty, which in this case were identified as the attainment of

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<sup>86</sup> Opinion 2/15 (n 2) para 109.

<sup>87</sup> Ibid para 83.

<sup>88</sup> *ERTA* (n 83).

<sup>89</sup> TFEU, Arts 63-66.

<sup>90</sup> Opinion 2/15 (n 2) para 25.

<sup>91</sup> Opinion 2/15 (n 2) paras 229, 233- 236.

free movement of capital *vis-à-vis* third states in Title IV of the Treaty<sup>92</sup>. Nonetheless, also in line with the outcome of Opinion 1/94, the CJEU found that since the exclusive competence cannot be justified on the basis of Article 3 TFEU, its nature must be shared<sup>93</sup>. This is an important outcome for the future evolution of the Union's investment competences, because in the light of the past developments in the CCP, an ability to act in a particular sphere of external relations eventually leads, to a full transfer of competences to the supranational centre. From the perspective of the neofunctionalist framework, Opinion 2/15 permitted existence of a functional framework that enables future integration in the CCP.

However, a specific problem relating to the development of the EU's competence to implement a comprehensive policy on international investment concerns the dispute resolution procedure. In relation to this aspect, the Court denied the Union an exclusive competence over all disputes brought in investor-state arbitration on vaguely formulated grounds that the mechanism is not purely ancillary to the substantive rules<sup>94</sup>. In this context, the Court ruled that because submission of a claim by an investor to investor-state tribunal results in a removal of such a claim from the jurisdiction of a Member State, the latter must participate in the agreement to express their consent to this<sup>95</sup>. The logic of the Courts is difficult to understand, particularly that earlier in the Opinion 2/15 the Court reasoned on the basis of *International Fruit Company*<sup>96</sup>, that when the EU acquires exclusive competences it succeeds the Member States in all of their international commitments<sup>97</sup>. It is unclear, therefore, why application of this principle permits the Union to agree to termination of existing BITs<sup>98</sup>, but at the same time does allow it to express a consent to investor-state arbitration on behalf of the Member States.

The lack of clarity is heightened by the fact that the Court was not as disciplined in its reasoning, as it was in relation to the substantive parts of the investment chapter and did not identify a Treaty provision that could give rise to EU's shared competence over this aspect of the investment treaty<sup>99</sup>. Though, potentially Articles 216 with 63 TFEU, could

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<sup>92</sup> Opinion 2/15 (n 2) para 241.

<sup>93</sup> Ibid para 216.

<sup>94</sup> Ibid para 292.

<sup>95</sup> Ibid 290.

<sup>96</sup> Joined cases 21 to 24-72 *International Fruit Company NV and others v Produktschap voor Groenten en Fruit* [1972] ECR 1219.

<sup>97</sup> Opinion 2/15 (n 2) para 248.

<sup>98</sup> Ibid para 249.

<sup>99</sup> Ibid para. 293.

also provide a valid Treaty base in this case. A conclusion that the investor-state dispute resolution mechanism is not purely ancillary in nature poses problems from the perspective of the future evolution of the EU's investment powers. A direct consequence of this is that the Union's exclusive power over FDI can be considered to extend only to establishing substantive rules, but not the dispute resolution mechanism for their enforcement. Thus, extension of the scope of the CCP to include non-direct investment will not necessarily mean that the EU will be able to conclude investment agreements without the Member States. In the light of the Opinion 2/15, the Member States may be required to expressly confer upon the Union a competence to consent on their behalf to investor-state arbitration.

Moreover, the shared nature of the Union's competence in the sphere of investment limits the effectiveness of its action on the international scene, as it necessitates the use of a mixed procedure for conclusion of EU international treaties, which requires consent of all Member States. As evaluated in Chapter 3, the recent saga involving signature of CETA which contains the Union's first investment chapter, proves that individual states are prepared to use their veto power even if this means undermining the collective effort. In the light of strong feelings of sovereignty consciousness, which persist among the Member States in this area of foreign policy, it may be difficult for the Commission to establish itself as a credible actor in the area of international investment without exercising exclusive competence.

Niemann identifies four problems with the use of the mixed procedure for conclusion of EU international investment agreements<sup>100</sup>. Firstly, the requirement of unanimity could bring the negotiations to the lowest common denominator<sup>101</sup>. In the case of common investment policy, this could jeopardise the attainment of ambitious market liberalisation objectives and high standards for investment protection. However, as evaluated in Chapter 3, lack of exclusive power in the field has not, so far, prevented the Commission from proposing ambitious reform of the substantive and procedural standards commonly found in Member States' BITs. Secondly, mixed agreements create an opportunity for the Member States to influence the outcome of the talks, through enabling them to block or delay negotiations, even in areas which are of limited importance to them<sup>102</sup>. Thus, in

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<sup>100</sup> Niemann (n 1) 124.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid.

relation to the development of the new investment policy, the Member States enjoy a considerable bargaining power as lack of support of just one country puts the successful outcome the Union's negotiations at jeopardy. Thirdly, the veto power enjoyed by the Member States allows a negotiating partner to exert influence over individual Member States, through offering specific concessions. This weakens the negotiating position of the Union, which in situations like this is unable to formulate a common position and achieve the optimal solution for the Member States<sup>103</sup>. Finally, the signature of a mixed agreement takes considerably longer<sup>104</sup>. All of these factors are considered as weaknesses in the functional structure post-Lisbon, which give rise to countervailing forces in the process of integration in the CCP.

## **2.5. The Role of EU institutions in the evolution of the CCP**

As outlined above the judgments of the CJEU have played an important part in the incremental evolution of the CCP. Although, in its recent Opinion, the Court was not prepared to be activist in relation to the Union's investment powers, the ruling creates conditions for further integration in the field. Alongside the CJEU, the Commission and the Council have also been important actors who have influenced constitutional changes in the area of commercial policy. In relation to the issue concerning the delimitation of investment competence, the former adopted an expansive view on the Union's power and advocated for the exclusive competence over all aspects of investment<sup>105</sup>. The latter, however, only approved the exercise of a shared power and conclusion of mixed agreement concerning investment protection<sup>106</sup>. The same positions were consistently maintained by the Commission and the Council in the past debates concerning the Local Cost Standard, Natural Rubber and the WTO<sup>107</sup>.

The interinstitutional conflict shaping the scope and nature of the Union's commercial policy is a characteristic consistent with the neofunctionalist theory. In this context, the theoretical assumptions recognise that supranational institutions, once established, will promote integration, even if it is not their primary function<sup>108</sup>. According to the theory,

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<sup>103</sup> Niemann (n 1) 124.

<sup>104</sup> Claus-Dieter Ehlermann, 'Mixed Agreements: List of Problems' in David O'Keeffe and Henry G Schermers, *Mixed Agreements* (Kluwer 1983), 16.

<sup>105</sup> Opinion 2/15 (n 2) para 25.

<sup>106</sup> Ibid.

<sup>107</sup> Opinion 1/75 (n 47); Opinion 1/78 (n 51).

<sup>108</sup> Mette Eilstrup-Sangiovanni, 'Neofunctionalism and its Critics', in Eilstrup-Sangiovanni M (ed), *Debates on European Integration: A Reader* (Palgrave Macmillan 2006), 91.

supranational bodies are an important source of expansive dynamism in the process of European integration and are agents responsible for moving it forward<sup>109</sup>. Both early formulations and the latest revisions of the theory, propose that some of the market and political integration initiatives have proceeded only through the activities of the Court and the Commission<sup>110</sup>, acting as “trustees exercising fiduciary responsibilities under the treaties”<sup>111</sup>.

The Treaty of Lisbon 2009 has increased the number of participants in the interinstitutional debate concerning the CCP. The new provisions have enhanced the role and powers of the European Parliament regarding the negotiations, conclusions and implementation of international trade agreements<sup>112</sup>. Furthermore, Article 207 TFEU grants the European Parliament power to define, alongside the Council, the framework for implementation of the commercial policy. The development of the EU’s common investment policy is an opportunity for the European Parliament to establish itself as a meaningful actor in this sphere of the EU competence and contribute towards the furthering of the process of integration in the CCP.

Integration in the CCP has been depicted in this study as dialectical process, which depends upon abilities of the EU institutions to cultivate pro-integrative pressures. In the context of the future development of the common investment policy, the Commission and Parliament are identified as embodiments of positive forces in the process. The Court is recognised, as a source of both positive and negative influence, with on the one hand enabling the Union’s action in the field, but on the other creating uncertainty about the compatibility of the investor-State dispute resolution system with EU law<sup>113</sup>. Finally, the Council has been identified as the major source of the countervailing force<sup>114</sup>.

## **2.6. The Dialectical nature of the Process of Integration**

In accordance with the revised neofunctionalist framework, actors in the process of integration operate within a functional structure that they can exploit<sup>115</sup>. In the post-

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<sup>109</sup> Sandoz and Stone-Sweet (n 18) 20.

<sup>110</sup> Ibid 20.

<sup>111</sup> Ibid 22.

<sup>112</sup> TFEU, Arts 207, 218.

<sup>113</sup> See Chapter 5.

<sup>114</sup> See Chapter 4.

<sup>115</sup> Niemann (n 1) 24.

Lisbon configuration, there are both positive and negative forces that the EU institutions can utilise in order to further their objectives.

The unique nature of EU law has been considered in this thesis as one of the endogenous factors which may limit the development of the EU's international investment policy. Already in its first ruling concerning the CCP, the CJEU had emphasised that any international agreements concluded by the EU must be compatible with the Treaty<sup>116</sup>. As evaluated in Chapter 6, the CJEU adopts a strongly pluralistic approach towards international law, because of its role as the guardian of the Treaty. This increases probability that the investor-state dispute resolution mechanism, which is an essential part of any treaty for protection of FDI, will be found incompatible with EU law. Consequently, the legal framework within which the Union exercises its external powers, is recognised in this thesis as one of the endogenous factors which can be used to curtail the process of the neofunctionalist expansion of the CCP.

### **2.6.1. The Role of Exogenous Pressures in the Analysis**

The original assumptions of neofunctionalism did not consider exogenous pressures as a factor that affected the process of integration. In the original account, Haas focused mainly on analysing the demands for further integration deriving from increased cross-border transactions within the internal market<sup>117</sup>. However, with the rise of globalisation, later revisions of the theory have started to take into account impact of the exogenous factors<sup>118</sup>. The role of external developments is particularly relevant in the analysis concerning the process integration in the sphere of EU external action. To date, changing multilateral trade agenda has been one of the most important forces driving the changes in the CCP forcing the Union to formulate its position with respect to trade in services and intellectual property rights, and eventually to revise the scope of its commercial policy.

To that end, in his revised version of the neofunctionalist theory, Niemann identified external pressures, such as changes in the global market, as the most important factors contributing to the expansion of the Union's commercial policy<sup>119</sup>. In his opinion, the outside environment played a part in the decision of the Member States to add FDI to the

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<sup>116</sup> Opinion 1/75 (n 47) para 9.

<sup>117</sup> Sandoz and Stone Sweet (n 18) 21.

<sup>118</sup> Niemann and Schmitter (n 16) 54.

<sup>119</sup> Niemann (n 1) 120.

scope of Article 207 TFEU<sup>120</sup>. However, as pointed out above, in the light of the negotiating history of the Treaty of Lisbon 2009 it appears unlikely that the Member States envisaged that the transfer of FDI competences to the Union will give rise to the common investment policy intended to succeed existing networks of BITs. Inability to predict *ex ante* consequences of Treaty amendments is recognised by the neofunctionalist theory, as another factor that ensures dynamism of the process and created conditions for spillover effect.

The argument that exogenous factors have not been the major pressure, which gave rise to the transfer of FDI powers to the EU is further supported by the fact that an external event which triggered the decision to add FDI to the scope of the CCP is difficult to identify. Matters relating to international investment protection have never successfully been introduced on the multilateral forum<sup>121</sup>, and although the number of BITs significantly increased in the 1990s<sup>122</sup> the EU did not respond to this development until the entry into force of the Treaty of Lisbon 2009.

However, neofunctionalists propose in this context that an exogenous pressure only becomes influential when it is perceived as important by the key actors in the integration process<sup>123</sup>. The report of the Working Group VII on External Action, which preceded the entry into force of the Treaty of Lisbon, observed that in the light of the raising importance of developing economies it became increasingly difficult for individual Member States to influence international developments on their own, and recognised benefits flowing from collective action in this area<sup>124</sup>. Bungenberg further proposed that a coherent trade and investment policy are essential for the Union to act as efficiently on the international scene as its main rivals, USA and China, thus ensure its international competitiveness<sup>125</sup>.

Notwithstanding the analysis in the preceding paragraph, although the exogenous factors might have had some influence on the decision to transfer powers in the sphere of FDI to

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<sup>120</sup> Ibid.

<sup>121</sup> The first attempts to negotiate multilateral agreement on international investment had been undertaken in 1960s under the auspices of the OECD. Following the unsuccessful conclusion of these negotiations, the OECD launched similar talks in 1995 which also failed. Rudolf Dolzner and Christoph Schreuer, *Principles of international Investment Law* (OUP 2008), 18-26.

<sup>122</sup> Sornarajah (n 4) 172.

<sup>123</sup> Niemann (n 1) 127.

<sup>124</sup> The European Convention (the Secretariat), 'Final Report of Working Group VII on External Action' (16 December 2002) COV459/02.

<sup>125</sup> Bungenberg (n 6) 35.

the Union, the unique external circumstances in relation to international investment are recognised in this work as one of the main countervailing forces in the development of a comprehensive EU policy. From an international perspective, the development and implementation of the EU's international investment policy presents unique challenges for the Union. The specific context in which the policy develops is as described below.

### **2.6.2. The External Context for the EU International Investment Policy**

Unlike in the area of free trade, the Union's contribution to establishing post-war rules of the game in the sphere of international investment was minor at best, especially when compared to that of the Member States. The first treaty containing provisions on investment protection was signed between Germany and Pakistan in 1959 and since then Germany, as well as, France, Netherlands, Italy, Belgium, Luxembourg, Sweden, Denmark and the UK embarked on ambitious BIT programmes<sup>126</sup>. These countries contributed to the establishment of what became known as the 'European Model BIT', which at the time set the global standards for protection of foreign investment<sup>127</sup>. When in 1980s and early 1990s there was another surge in the number of BITs concluded worldwide, the European Model BIT was adopted by other European states, such as: Austria, Spain, Finland, Portugal, Greece, Cyprus, Malta, as well as Central and Eastern European States, all of which are now members of the EU. The only EU Member State, which has not concluded any BIT is Ireland, though it signed the Energy Charter Treaty which is a multilateral agreement providing rules for investment protection in the energy sector<sup>128</sup>.

The plethora of Member States BITs is one of the obstacles that stands in the way of the EU's common investment policy. Firstly, the succession of the Member States by the Commission in investment treaty negotiations, as well as future replacing of existing BITs<sup>129</sup> is going to reduce the visibility of individual states on the international scene. Rosas suggests that this is an important factor taken into account by the Member States

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<sup>126</sup> Chester Brown (ed), *Commentaries on Selected Model Investment Treaties* (OUP 2013), 9.

<sup>127</sup> Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (Kluwer Law International 1995).

<sup>128</sup> Constituency of the Energy Charter Conference, Members of the Energy Charter Conference<<http://www.energycharter.org/who-we-are/members-observers/>> accessed 29 January 2018.

<sup>129</sup> Regulation 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries [2012] OJ L351/40 (Transitional Arrangements Regulation).



when the competences in the area of external relations are transferred to the EU<sup>130</sup>. In this context, the Member States favour the use of the mixed procedure, as it requires their involvement, even though the competences are exercised at the level of the Union. Thus, during the official signing ceremonies the Member States are afforded an opportunity to highlight to the global community their continued relevance. Consistently with this analysis, since the entry into force of the Treaty of Lisbon 2009 the Council has defended the Member States' ability to participate in the signing of the EU's future investment agreements<sup>131</sup>. This desire of the Member States to preserve visibility on the international scene can be considered as one of the factors that prevents or prolongs the process of shifting of the national loyalties to the supranational centre in the area of external relations. Thus, from the perspective of the neofunctionalist theory, this can be identified as one of the countervailing forces in the process of integration.

In relation to the latest developments in the CCP, the area of international investment presents a bigger challenge to the Union, when compared to for example international trade. Common trade policy has always been considered an essential element of the customs Union. Moreover, as many countries were looking to establish new rules of the game for the post-war reality delegating this task to supranational institutions seemed like an effective way of achieving this goal. Thus, it did not take the Union a lot of time to legitimise its international action in the sphere of trade among the Member States and to gain a good reputation in the field among the international community. Although incorporating international investment into the scope of the Union's competences is an important step forward in the process of integration, a development of the common investment policy can be considered as non-essential from the perspective of the functioning of internal market, given that for over fifty years this area was regulated exclusively by the Member States. In the light of the analysis in this section, common investment policy presents higher opportunity costs for the Member States when compared to the development of the common trade policy and its successful implementation should not be taken for granted. The future developments in this area challenge Haas's neofunctionalist assumption that spillover occurs automatically<sup>132</sup>.

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<sup>130</sup> Allan Rosas, 'The Future of Mixity' in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: the EU and Its Member States in the World* (Hart Publishing 2010) 369.

<sup>131</sup> See: Chapter 5.

<sup>132</sup> Niemann (n 1) 16.

Furthermore, as prior to the entry into force of the Treaty of Lisbon 2009, international investment has been an important area of the Member States' activity on the international scene, the replacing extensive networks of Member States' BITs with a common solution could further inspire feelings of sovereignty consciousness increasing the strength of countervailing forces that negatively impact the process of integration in the area of foreign relations. BIT programmes of countries such as, for example France, Germany and Netherlands have enabled their emergence as global leaders in the field. For these countries, their BITs are a source of national pride and a part of their international identity. This was illustrated for example by the fact that Germany celebrated the 50th anniversary of its first BIT with a special ceremony in Frankfurt<sup>133</sup>. This event coincidentally took place on the day of the entry into force of the Treaty of Lisbon 2009 in which the Member States transferred investment treaty-making powers to the EU. Moreover, the reluctance to cede the power over the area of international investment to the institutions of the EU is visible in the fact that some Member States continue to expand their networks of BITs, despite the concurrent efforts of the Commission's to put the Union on the BIT map<sup>134</sup>.

However, not all Member States have become global leaders in the field of investment and some may support the replacement of the exiting BITs with a new generation EU agreements, which, as evaluated in Chapter 3, seek to strike a better balance between states' right to regulate and investors' protection, which was observed by Advocate General Whatelet in the case *Achmea v Slovakia*<sup>135</sup>. Despite the fact that existing European BITs adopt similar formulation of the substantive protection standards, they did not to produce a uniform experience for all Member States. This puts ahead of the Commission a difficult task of devising a common solution that meets interests of all Member States and improves upon their current practice. The differences in attitudes towards the existing system for protection of foreign investment raises doubts whether this competence is best exercised at the supranational level.

There are number of factors that explain this divergent experience of the Member States in international investment, these include for example: levels of economic and political development, as well as the direction of their BIT programmes. As evaluated in Chapter

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<sup>133</sup> Rudolf Dolzer and Yun-I Kim, 'Germany' in Chester Brown, *Commentaries on Selected Model Investment Treaties* (OUP 2013) 289.

<sup>134</sup> See: (n 11).

<sup>135</sup> Case C-284/16 *Slovak Republic v Achmea BV* [2017] Opinion of AG Wathelet, para 41.

3, states that are rarely challenged in investor-state arbitration tend to be those with mature political systems, generally classified as net exporters of foreign capital that have focused mainly on concluding their BIT with the developing countries. The second category consists of poorer Member States, often ones that had to transition to free market economies, classified as net-importers of foreign capital and possessing BITs also with developed countries.

Another problem that has been discovered since the Union decided to take an active role in the sphere of international investment concerns the fact that prior to their joining of the EU, the latter group of states concluded BITs with states that later became their fellow Member States. Thus, as analysed in Chapter 3, since the inception of the EU's international investment policy one of the contentious points in the discussion related to the status and validity of these so called intra-EU BITs. Unlike the capital exporting Member States, the Commission together with the net-importing countries argued that the intra-EU BITs are not compatible with EU treaties and should be terminated<sup>136</sup>. Since the challenges against EU Member States are most frequently brought by European investors under these intra-EU BITs, as highlighted in Chapter 3, it is understandable why some Member States have been seeking legal means for their annulment, especially in the light of a considerable financial burden of investor-State awards. However, this proposal has not been met with equal enthusiasm by all Member States.

As indicated in the analysis above, the international investment policy presents itself as a difficult new frontier for the EU integration. The complexity of this challenge is magnified by the existing complex networks of the Member States' BITs, which increase the opportunity costs of the transition from individual policies to a common solution, thus within the framework of neofunctionalism they stand in the way of the shifting of loyalties to the supranational centre.

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<sup>136</sup> Ibid.

## 2.7. The Central Research Question

The neofunctionalist theory of integration has been selected as a theoretical framework for this PhD because its main focus is on the dynamics of the European integration. Moreover, neofunctionalist assumptions place the supranational actors at the heart of the process and posit that the institutions, once created, take life of their own and are difficult to control by the Treaty masters. Through the pursuit of their individual interests, the goal of which is power maximisation, the institutions become an engine of the EU integration. The interinstitutional power struggle determines the character of the European integration which relies on incremental decision-making with imperfect knowledge of consequences over the grand design.

It is in the context of these theoretical assumptions that this study examines how the institutional dynamics in the post-Lisbon era have shaped the EU's international investment policy. Furthermore, by placing the development of this new external policy area in a wider context the thesis evaluates the likely future course of the process of integration in the CCP. This perspective allows to account for the constraints faced by the EU decision makers in devising the optimal option for the EU's comprehensive policy on international investment.

To that end, the emergence of the EU's common policy on international investment is considered as another step in the process of EU integration, a new functional structure that can be exploited by the supranational actors to cultivate pro-integrative pressures in the CCP. Thus, this study focuses on how actions of the EU's main institutions, i.e. the Commission, Council, the CJEU and the European Parliament impacted the dialectical process of integration in the CCP.

Therefore, the central research question that this PhD has addressed is:

*From the perspective of the neofunctionalist theory of integration what has been the role of the EU institutions in furthering the process of integration in the area of the CCP, since the entry into force of the Treaty of Lisbon 2009?*

The enquiry starts with evaluating the efforts of the Commission, which has been the motor of integration in this area. The chapter that follows, assesses the contribution of the European Parliament, which has also been identified as a positive force in the process. The Council is the main focus of Chapter 5. However, unlike the other two institutions,

the Council has been identified as the main embodiment of the countervailing forces within the neofunctionalist framework. The final part of the work is devoted to the evaluation of the compatibility of the investor-state dispute resolution provisions with EU law. In this context, the impact of the CJEU on the development of the common investment policy is evaluated.

In addition to evaluating the interinstitutional dynamic in the CCP post-Lisbon, this work also aims to illuminate how the unique nature of the EU legal order and special characteristics of the process of integration affect the development of the EU investment policy.

## **2.8. Conclusions**

Past developments in the CCP indicate that the EU's policy on international investment is likely to eventually replace individual policies of the Member States, though this area of Union's competence presents unique and complex challenges which may prevent further transfer of competences to the Union. Even if the supranational institutions are capable to cultivate sufficiently strong pro-integrative pressures the process will take a considerable amount of time. In the short- and medium-terms, the deficiencies of the current Treaty rules will become more apparent, which will motivate further shift in the national loyalties and could ultimately lead to greater levels of integration between the Member States in the area of the CCP, consistently with the assumptions of the neofunctionalist theory of integration. However, in the light of the rejection of the automatic effects of spillover by the revised neofunctionalist framework, the success of the project cannot be taken for granted.

This chapter examined the latest, extended version of Article 207 TFEU in the context of gradual expansion of the Union's commercial policy. The analysis presented the evolution of the CCP as progressive, but incremental and consistent with the basic assumptions of the neofunctionalist theory of integration. The chapter recognised that the addition of FDI to the scope of the CCP marked the beginning of a new constitutional change in the area of EU's external action.

In line with the revised neofunctionalist framework the process of integration in this thesis is considered to be dialectical in nature, i.e. affected by both positive and negative forces of integration. In this context, the EU institutions are considered to be the main embodiments of these forces, thus affecting the future direction and pace of the process

of integration. Consequently, the following chapters evaluate the role of EU institutions in the development of the EU's international investment policy and impact of their actions on the future progress of integration in the sphere of the CCP.

## **Chapter 3.**

# **The Contribution of the Commission to the Development of the Common Policy on International Investment and the Role of the Institution in the Process of Integration in the CCP**

### **3.1. Introduction**

As highlighted in Chapter 2, although in the Treaty of Lisbon 2009 the Member States have expanded the scope of Article 207 TFEU, they have not endowed the Union with a comprehensive set of powers in the area of investment. Therefore, the entry into force of the latest Treaty revision has started a new phase in the integration in the CCP. Since an effective action of the Union in the field of international investment requires further transfer of competences, the Commission's main task in the post-Lisbon era is to cultivate pro-integrative forces that lead to such an outcome. In the neofunctionalist framework, the EU institutions play a central part in persuading the Member States to shift their loyalties to the supranational centre. Thus, the interinstitutional dynamics in the area of international investment policy will decide on the future of integration in the CCP.

Within the framework of the neofunctionalist theory, the Commission's role in the process of integration is to foster positive pressures that ensure further transfer of competences from the Member States to the Union. In line with this task, the Commission has launched a comprehensive strategy for delivering common policy designed to cultivate spillover on multiple fronts. However, in the light of the existing BIT networks, the Commission faces a difficult task of trying to emerge as a credible actor in the field, capable of replacing the Member States.

In the light of the main research question, this chapter evaluates from the perspective of the neofunctionalist theory of integration the contribution of the Commission to furthering the process of EU integration in the area of the CCP through its actions concerning common investment policy.

### **3.2. The Commission in the Neofunctionalist Framework**

The neofunctionalist theory of integration has always recognised the essential role of the Commission in driving the European integration forward with early theoretical accounts assigning to the institution a function of creating and highlighting to the Member States

functional pressures in order to maximise the integrative outcome.<sup>1</sup> As explained in the introduction to this thesis, the later revisions have systematised the analysis of the Commission's contribution under the heading of a cultivated spillover.<sup>2</sup>

The Commission has been trying to cultivate integrative forces with an aim to enable further transfer of comprehensive powers in the sphere of international investment since the Maastricht IGC. However, thus far the Member States have been unwilling to grant all-encompassing powers in external economic relations to the EU in any Treaty negotiations.<sup>3</sup> Instead, as evaluated in Chapter 2, an incremental transfer of competences in each field has been preferred. The Commission has played a key role in securing the extension of the Union's powers in the sphere of the CCP during the Convention leading up to the conclusion of the Treaty of Lisbon 2009.<sup>4</sup> In comparison with previous IGCs, this was one of the most successful Treaty negotiations for the institution.<sup>5</sup> The Commission facilitated the decision to grant to the EU exclusive competences in the spheres of trade in services and intellectual property rights. Furthermore, incorporating a reference to FDI into the wording of Article 207 TFEU commenced the process of integration in international investment.<sup>6</sup> Since the latter transfer does not enable an independent action of the EU in the field of international investment protection,<sup>7</sup> the recent Treaty revision marks only the beginning of the Commission's task of ensuring further shift of Member States' loyalties to the supranational centre. Thus, the Commission's efforts to foster spillover pressures for further integration in the CCP continue in the post-Lisbon era, this time they concern the area of international investment.

From the perspective of the revised neofunctionalist theory, integration is a dialectical process, which means that it occurs when the positive pressures of spillover are perceived

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<sup>1</sup> Ernst B Haas, 'International Integration: The European and Universal Process' (1961) 15 *International Organization* 366, 368-369; Leon Lindberg, *The Political Dynamics of European Economic Integration* (Stanford University Press 1963), 73.

<sup>2</sup> Arne Niemann, *Explaining Decisions in the European Union* (CUP 2006) 140-151.

<sup>3</sup> *Ibid* 116.

<sup>4</sup> More precisely, the Convention was concerned with the Constitutional Treaty, which had never entered into force. Nonetheless, the negotiated amendments of the CCP have been preserved in the Treaty of Lisbon 2009. Arne Niemann, 'Conceptualising Common Commercial Policy Treaty Revision: Explaining Stagnancy and Dynamics from Amsterdam IGC to the Treaty of Lisbon' (2011) 15 *European Integration Online Papers*, 34-35. <<http://eiop.or.at/eiop/>> accessed 5 January 2017.

<sup>5</sup> *Ibid* 31-35.

<sup>6</sup> Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 (TFEU), Art 207.

<sup>7</sup> For detailed analysis of this issue see Chapter 2.



as stronger than the countervailing forces by the actors.<sup>8</sup> The Commission, as the engine of integration, has an essential role to play in cultivating pro-integrative forces. Although, as evaluated in Chapter 2, the institution has a wealth of experience in performing this function, furthering the process of integration in the area of investment presents itself as a more difficult task in comparison to trade in services or intellectual property rights. In relation to the latter areas, the Commission was able to cultivate exogenous pressures stemming from the WTO in order to argue convincingly for exclusive EU competence.<sup>9</sup> Similar exogenous pressures are missing with respect to investment as to date efforts to establish a multilateral system have failed.<sup>10</sup> Moreover, as evaluated in the subsequent section, the Commission has to deal with strong exogenous countervailing forces, in a form of existing investment policies of the Member States, which stand to undermine future integration in the CCP.

The Commission has, however, tried to create new pressures with an aim to persuade the Member States that a collective solution to international investment protection benefits them more than individual action. To that end, the Commission has used the apparent legitimacy crisis in the field of international investment as a new exogenous pressure and supported by the work of UNCTAD, proposed an ambitious reform plan.<sup>11</sup> The Commission further argued that the EU is in the best position and has a responsibility to lead the change in the system for investment protection, which it presents as essential and inevitable.<sup>12</sup> To that end, the need for reform which is supported by an external epistemic community, legitimises the Commission's action in the sphere of investment and equips it with arguments for further transfer of competences.

The revised neofunctionalist theory of integration treats exogenous pressures as a structural component, which has a propensity for causing further integration as rational actors are frequently persuaded to act upon them.<sup>13</sup> However, the updated theoretical account dispenses with the old deterministic ontology concerning automaticity of

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<sup>8</sup> Niemann (n 2) 50.

<sup>9</sup> Detailed evaluation of the evolution of the Union's powers in areas of trade in services and intellectual property rights is contained in Chapter 2.

<sup>10</sup> Stefan D Amarasingha and Juliane Kokott, 'Multilateral Investment Rules Revisited' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment* (OUP 2008).

<sup>11</sup> UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* (United Nations Publication 2015).

<sup>12</sup> Commission, *Trade for All: Towards a More Responsible Trade and Investment Policy*, (Publication Office of the European Union, 2014), 21.

<sup>13</sup> Niemann (n 2) 34.

functional spillover and adopts a softer approach subscribing greater role in the process to supranational actors.<sup>14</sup> Thus, exogenous pressures have to be perceived as stronger than the countervailing forces to become a factor that inspires actors to act upon them and, as a consequence, move the process of integration forward. Consequently, the future shift of loyalties to the supranational centre depends on the Commission's ability to persuade the Member States that the reform of the system of investment protection is necessary and that the EU is best placed to lead this change.

### **3.3. The Commission's Ability to Foster Further Integration in the CCP**

#### **3.3.1. The Commission's Powers**

The legal framework provided in the Treaty equips the Commission with powerful tools that it may use in developing and implementing EU investment policy to foster further integration. Arguably, the future of integration in the area of investment depends on the success of the Commission's actions. The powers of the Commission include, first of all, the right to initiate policy proposals,<sup>15</sup> which was used by the institution immediately after the entry into force of the Treaty of Lisbon 2009 to announce that the Union is going to develop a comprehensive international investment policy that encompasses rules on investment protection.<sup>16</sup> The immediate action by the Commission has been a strong expression of its intentions to replace the Member States as actors in the field of international investment. It has commenced vivid discussions and gave momentum to the new policy.<sup>17</sup> In the light of the evolution of the EU competences in the CCP, this has been an important move on the part of the Commission towards securing further transfer of competences. As argued in Chapter 2, continued action of the EU in a field of shared competences creates favourable conditions for further integration.

Secondly, the Commission can also propose legislation,<sup>18</sup> and in relation to investment it developed two Regulations, one of which establishes a mechanism for replacing existing

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<sup>14</sup> Ibid 31.

<sup>15</sup> Consolidated Version of the Treaty on the European Union [2016] OJ C202/13 (TEU), Art 17.

<sup>16</sup> Commission, 'Towards a Comprehensive European International Investment Policy' (Communication) COM (2010) 343 final.

<sup>17</sup> Some examples of commentaries concerning the EU investment policy, which emerged soon after the Commission's Communication include: Angelos Dimopoulos, *EU Foreign Investment Law* (OUP 2011); Marc Bungenberg, Jörn Griebel, Steffen Hindelang (eds), *European Yearbook of International Economic Law. Special Issue: International Investment Law and EU Law* (Springer 2011); Nicolas J Calamita, 'The Making of the Europe's International Investment Policy: Uncertain First Steps' (2012) 39 *Legal Issues of Economic Integration* 301.

<sup>18</sup> TEU, Art 17.

individual Member States' policies with a common solution and second for determining financial responsibility in investor-State arbitration under EU's future agreements.<sup>19</sup> These Regulations provide a framework for implementation of the EU's international investment policy and its future enforcement. As evaluated in greater detail in Chapter 5, the Commission has tried with its proposal to maximise its control over the existing networks of the Member States BITs. In relation to the implementation of the new policy, the Commission has also used the powers granted to it as the guardian of the EU Treaty,<sup>20</sup> to ensure more effective replacement of the existing Member States BITs with the EU solution by bringing infringement actions against EU Member States for their failure to terminate some of their BITs. This issue is analysed in greater detail in a section below.

Finally, the Commission possesses competence to represent the Union externally, which it has used to participate in investor-state disputes pursuant to Member States BITs.<sup>21</sup> This action has contributed towards establishing the Union's position on the international scene.<sup>22</sup> Insofar as the external representation is concerned, the Commission is also responsible for developing and negotiating the content of the EU's future investment Treaties.<sup>23</sup> This task is of a great importance, as a credible proposal that adds value to the current action of the Member States would go a long way in persuading them to transfer to the Union exclusive powers in the sphere of investment. However, in the light of the existing networks of Member States' BITs this is not going to be an easy task.

The section below evaluates the existing Member States investment treaties as a factor within the neofunctionalist framework that hampers development of the EU international investment policy and is an obstacle to further integration in the field of the CCP.

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<sup>19</sup> Regulation 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries [2012] OJ L351/40 (Transitional Arrangements Regulation); Regulation 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is a party [2014] OJ L 257/121 (Financial Responsibility Regulation).

<sup>20</sup> TEU, Art 17; TFEU, Art 258.

<sup>21</sup> TEU, Art 17.

<sup>22</sup> Fernando Dias Simões, 'A Guardian and a Friend? The European Commission's Participation in Investment Arbitration (2017) 25 Mich. St. Int'l L. Rev. 233.

<sup>23</sup> TEU, Art 17; TFEU, Art 207, 218.

### 3.3.2. The Existing Member States' BITs as a Source of Countervailing Forces

The EU Member States, particularly the capital exporting ones, have pioneered the BIT movement. The first treaty for protection of investment has been signed between Germany and Pakistan in 1959.<sup>24</sup> Soon after that, all major European states embarked on their BIT programmes<sup>25</sup> and in 1968 the Netherlands included, for the first time, the investor-state dispute resolution provisions in their treaties,<sup>26</sup> which a year later was followed by Italy and then other states.<sup>27</sup> As observed by many commentators, 'the European model BIT' that developed through the practice of the Member States has shaped the field of international investment.<sup>28</sup>

At the time, that the Member States had been establishing themselves as the dominant force in the field, the Commission was focused on building the EU's common trade policy. Thus, from the European perspective, trade and investment have existed in two parallel universes.<sup>29</sup> In this context, whilst the international trade practice of the Member States was being consolidated under the umbrella of the CCP, their BITs with third states were rapidly multiplying. Today, the EU Member States have concluded over 1500 of BIT, which constitutes half of all treaties signed worldwide, with Germany, the UK, France, the Netherlands and Italy being among the countries with the most extensive networks of investment protection treaties.<sup>30</sup>

Although the Member States' BITs are not identical they display many common characteristics with respect to their content and structure, as majority of them has been

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<sup>24</sup> Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investment (signed 25 November 1956, entered into force 20 April 1962).

<sup>25</sup> The National Board of Trade, 'Securing High Investment Protection for EU Investors: A Review of EU Member States' Model BITs' (2012), 10-11.

<sup>26</sup> Nico Schrijver and Vid Prislán, 'The Netherlands' in Chester Brown (ed), *Commentary on Selected Model Investment Treaties* (OUP 2013), 542.

<sup>27</sup> John P. Gaffney and Zeynep Akçay, 'European Bilateral Approaches' in Marc Bungenberg and others (eds), *International Investment Law* (C.H. Breck, Hart, Nomos), 190.

<sup>28</sup> The Member States did not develop a model treaty *per se*, but their investment treaty-making practice is similar. Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties*, (Kluwer Law International, 1995), 1; Catharine Titi, 'International Investment Law and the European Union: Towards New Generation of International Investment Agreements', (2015) 26 EJIL 639; Thomas Eilmansberger, 'Bilateral Investment Treaties and EU Law' (2009) 46 Common Market Law Review 383, 386.

<sup>29</sup> Federico Ortino and Piet Eeckhout, 'Towards an EU Policy on Foreign Direct Investment' in Andrea Biondi, Piet Eeckhout and Stephanie Ripley (eds), *EU Law After Lisbon* (OUP 2012), 313.

<sup>30</sup> UNCTAD Investment Policy Hub <<http://investmentpolicyhub.unctad.org/IIA>> accessed 29 January 2018.

based on the OECD Draft Convention on the Protection of Foreign Property of 1967.<sup>31</sup> Thus, these treaties are primarily focused on investment protection and vaguely formulated standards they contain, such as: fair and equitable treatment, national treatment, most favoured nation treatment and expropriation offer considerable flexibility in interpretation to investment tribunals.<sup>32</sup> Furthermore, the BIT programmes of the capital-exporting countries were almost exclusively directed at the developing world.<sup>33</sup> The influence that the capital-exporting Member States have enjoyed over the years as the norm generators, combined with the success of their BIT programmes have made them reluctant to cede their power to the institutions of the Union in 2009.<sup>34</sup> Thus, within the neofunctionalist framework existing Member States' international investment policies can be considered as an exogenous source of countervailing forces. In this context, it can be observed that the Member States display heightened levels of sovereignty consciousness as the common action in the sphere of investment reduces their individual influence and visibility on the international scene.

The direct consequence of this attitude has been that the Member States wanted to retain high levels of control over the content of the EU international investment policy and the future of their networks of BITs. Their efforts with respect to the latter are evaluated in Chapter 5 in the context of trilogue negotiations on the legislative framework. In relation to the former, the negotiating directives for CETA and TTIP made it clear that the Member States did not intend to hand over the future development of the international investment agreements to the Commission. The instructions that were given to the Commission were very detailed and specified in no ambiguous terms that the EU's future investment protection agreements should closely follow the established Member States' practice and reproduce the substantive standards of the 'European model BIT'.<sup>35</sup> Such

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<sup>31</sup> The National Board of Trade (n 25), 11-12.

<sup>32</sup> Sergey Ripinsky and Diana Rosert, 'European Investment Treaty Making: Status Quo and the Way Forward (A Development Perspective)' (2013) 10 *Transnational Dispute Management*, 16-17, <[www.transnational-dispute-management.com](http://www.transnational-dispute-management.com)> accessed 06 January 2017; Titi (n 28) 647; Gaffney and Akçay (n 27), 191.

<sup>33</sup> Ripinsky and Rosert (n 32) 6. The only exceptions are: Treaty between the Federal Republic of Germany and the Hellenic Republic for the Promotion and Protection of Investment (signed 23 March 1961, entered into force 15 July 1962); Treaty between the Federal Republic of Germany and Portugal for the Promotion and Protection of Investment (signed 16 September 1980, entered into force 23 April 1982).

<sup>34</sup> Titi (n 28) 640; Eilmansberger (n 28) 392.

<sup>35</sup> Council, 'Recommendation from the Commission to the Council on the Modification of the Negotiating Directives for an Economic Integration Agreement with Canada in Order to Authorise the Commission to Negotiate, on Behalf of the Union on Investment (CETA Negotiating Directive)', 12838/11 WTO 270 FDI 19 CDN 5 Services 79 Restreint UE, para 26a; Council, 'Directives for the Negotiation on the Transatlantic

detailed instructions sent a clear signal that the Member States did not intend to introduce significant reform of the investment protection regime they have created. This conclusion is further supported by the fact that the Member States insisted for the EU's future investment agreements to increase the level of protection for the European investors abroad.<sup>36</sup> This objective does not align with the Commission's reform proposal implemented in the first EU investment agreements, which increases states' right to regulate, hence offers lower standards of investment protection in comparison to Member States' BITs. If this disagreement concerning goals of the EU investment policy persists, it could become an obstacle in securing further transfer of investment competences from the Member States.

The detailed character of the TTIP negotiating mandate has been noted by Advocate General Wathelet in the Case 425/13 *Commission v Council*, which concerned the agreement on the linking of the EU and Australia's schemes for the trading of greenhouse gas emission allowances.<sup>37</sup> The progressively more prescriptive nature of the directives has been attributed to the existing distrust of the Council towards the Commission in relation to international negotiations.<sup>38</sup> This has already been recognised as a significant countervailing force by the revised neofunctionalist framework in the context of previous IGCs.<sup>39</sup> In this context, commentators point out that in the Uruguay Round of negotiations leading up to the conclusion of the WTO agreements, the Commission was not always open with the Member States and on few occasions it had overplayed its hand by securing important agreements with third countries without the Council's consent to open negotiations<sup>40</sup>. The previous behaviour of the Commission has had a damaging effect on its relationship with the Member States. In this context, Advocate General Wathelet observed that over 20 years since the conclusion of the WTO agreement the climate of suspicion still surrounds the Commission<sup>41</sup>. Thus, the lack of trust between the EU's executive institutions that the Commission's previous behaviour has created is still

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Trade and Investment Partnership between the European Union and the States of America (TTIP Negotiating Directive)' ST 11103/13 Restreint UE/EU Restricted, paras 22-23.

<sup>36</sup> Council, 'Conclusions on a Comprehensive European International Investment Policy', 3041<sup>st</sup> Foreign Affairs Council Meeting (25 October 2010), para 8; Nikos Lavranos, 'In Defence of Member States' BITs Gold Standard: The Regulation 1219/2012 Establishing A Transitional Regime for Existing Extra-EU BITs – A Member State Perspective' (2012) 10 Transnational Dispute Management, 13-14, <[www.transnational-dispute-management.com](http://www.transnational-dispute-management.com)> accessed 06 January 2017.

<sup>37</sup> Case C-425/13 *Commission v Council* [2015] OJ C311/2, Opinion of AG Wathelet, paras 4, 9, 77.

<sup>38</sup> Ibid para 77.

<sup>39</sup> Niemann (n 2) 128.

<sup>40</sup> Piet Eeckhout, *EU External Relations Law* (2<sup>nd</sup> ed, OUP 2011), 197-198; Niemann (n 2) 136.

<sup>41</sup> Case C-425/13 *Commission v Council* [2015] OJ C311/2, Opinion of AG Wathelet, para 195.

identified as a countervailing forces in the process of further integration in the area of the CCP.

The practice of the Council to issue detailed negotiating directives disturbs the institutional balance established in the Treaty, by encroaching upon the Commission's powers to represent the Union externally.<sup>42</sup> The function of the negotiating directives is to provide a general direction and guidance to the Commission and not to impose a detailed position, otherwise, as observed by the Advocate General Wathelet, the mandates would become a negotiating 'diktat'.<sup>43</sup> The overly prescriptive directives pose a threat to the Union's negotiating position by turning the negotiations into simple 'take it or leave it game', making it difficult to strike a compromise with third country partners. Furthermore, the Commission, in fulfilling its external representation duties, does not act merely as the Council's agent, but as the representative of the Union, hence it is required to negotiate an agreement that best serves interests of the EU and obtains the approval of the European Parliament, as well as the Council, even if the agreement is mixed in nature.<sup>44</sup> Thus, the Commission requires flexibility in order to find a solution that best serves interest of all Member States and can be adapted if the circumstances change during the course of negotiations. Consequently, despite the Member States' attempt to retain full control over the negotiations of the EU's future investment agreements, the current Treaty structure does not allow for the Commission's margin of manoeuvre in international negotiations to be significantly curbed.<sup>45</sup>

### **3.3.3. The Commission Cultivating New Integrative Pressures**

The opening of TTIP and CETA negotiations have uncovered a considerable opposition of the civil society against the system of investment protection.<sup>46</sup> In these circumstances, the negotiating flexibility was necessary for the Commission to adjust its position. The Commission appeared to be responsive to public concerns expressed in the consultation

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<sup>42</sup> TEU, Arts 13(2), 17(1); TFEU Arts 207(3); Mauro Gatti and Pietro Manzini, 'External Representation of the European Union in the Conclusion of International Agreements' (2012) 49 CML Rev 1703, 1708-1710; Eeckhout (n 40) 196.

<sup>43</sup> Case C-425/13 *Commission v Council* [2015] OJ C311/2, Opinion of AG Wathelet, paras 68 and 71; Case C-425/13 *Commission v Council* [2015] OJ C311/2, para 90.

<sup>44</sup> Marise Cremona, 'Defending the Community Interest: the Duties of Cooperation and Compliance' in Marise Cremona, Bruno de Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals*, (Hart Publishing, 2008); Gatti and Manzini (n 42) 1709.

<sup>45</sup> Gatti and Manzini (n 42) 1711; Eeckhout (n 40) 197.

<sup>46</sup> 'Stop TTIP' is an example of a public campaign against CETA and TTIP registered as European Citizens Initiative. <<http://ec.europa.eu/citizens-initiative/public/initiatives/open/details/2017/000008>> accessed 20 December 2017; Case T-754/14 *Efler and Others v Commission* [2017] OJ C34/39.

involving the investment chapter in TTIP negotiations.<sup>47</sup> From the perspective of the neofunctionalist theory of integration, it can be observed that the legitimacy crisis in international investment has been used by the Commission as a new positive endogenous and exogenous pressure to legitimise the reform of system of investment protection.

Insofar as the current system of investment protection is concerned, the maintenance of the *status quo* is not an optimal solution for all EU Member States, which is a factor that the Commission could use in trying to cultivate support for its reforms. In this context, experience in investment arbitration of countries that acceded to the EU in and after 2004 differs significantly from that of old capital exporting Member States, despite the fact that all countries adopt similar investment protection norms. These differences stem mainly from the fact that the capital importing Member States, which acceded at a later date, as encouraged by the EU, concluded BITs with developed countries.<sup>48</sup> Consequently, as the new Member States hold treaties with countries that actually export investment to their economies, they face a much higher risk of being respondents in investors-state arbitration and, in fact, have had a significantly higher number of claims filed against them, in comparison to the pre-2004 EU-15 Member States.<sup>49</sup> In the recent case concerning Member States' BITs which pre-date the entry into force of the Treaty of Lisbon 2009, Advocate General Wathelet observed this division among the Member States<sup>50</sup>. From the party submissions mentioned in the Opinion in the *Achmea* case it appears that the Member States who had numerous cases launched against them in investor-state arbitration are likely to support the Commission's reforms proposals.<sup>51</sup> However, the capital exporting states that have not been challenged many times by foreign investors remain, at least for the moment, sceptical, in particular with regard to the termination of so called intra-EU BITs<sup>52</sup>.

Notwithstanding the current lack of unequivocal support for the Commission's actions, recent developments in investor-state arbitration demonstrate that the legal systems of

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<sup>47</sup> Commission, 'Online Public Consultation on Investment and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreements (TTIP)' (Report) SWD(2015) 2 final.

<sup>48</sup> Case C-284/16 *Slovak Republic v Achmea BV* [2017] Opinion of AG Wathelet, para 41.

<sup>49</sup> As of 7 September 2017 the total number of known investor-State claims filed against EU Member States, which acceded to the EU in or after 2004 was 140, in comparison to 57 claims against the pre-2004 EU-15. <<http://investmentpolicyhub.unctad.org/ISDS>> (accessed 09 September 2017)

<sup>50</sup> Case C-284/16 *Slovak Republic v Achmea BV* [2017] Opinion of AG Wathelet, para 34.

<sup>51</sup> Ibid para 36.

<sup>52</sup> Ibid.



capital exporting EU Member States are not immune to challenges by foreign investors, which could strengthen the Commission's case for reform. Although the main focus of BIT programmes of these states was the developing world, all of them concluded the Energy Charter Treaty.<sup>53</sup> The Energy Charter Treaty is a sectoral multilateral agreement, which provides a legal framework for energy cooperation, particularly in Europe.<sup>54</sup> The treaty offers, *inter alia*, broad protections to foreign investors in the energy sector, which are similar to those typically found in BITs.<sup>55</sup> It also provides for an investor-state dispute resolution mechanism.<sup>56</sup> In recent years this treaty has become the main source of claims against Western European countries, giving rise to 80 per cent of all known cases that featured one of the pre-2004 Member States as a respondent.<sup>57</sup>

The beginning of the surge in the number of claims against the EU capital exporters was in 2011, when in the aftermath of the financial crisis number of the EU states, such as Spain, Italy and Czech Republic decided to scale back on incentives for investment in the renewable energy sector, as they have started to become unaffordable for the public purse.<sup>58</sup> These policy decisions have had a negative impact on business of many foreign investors and resulted in record number of 34 known cases brought against Spain, as well as, nine against Italy and six against Czech Republic.<sup>59</sup> In addition to the renewable energy sector claims, a case brought in 2012 against Germany, one of the main advocates for broad investment protection standards, sparked a considerable controversy as it involved a challenge of the German government's decision to phase out nuclear power plants by 2022 in the wake of the Fukushima nuclear disaster.<sup>60</sup> These cases have been one of the main causes of the current opposition of civil society in Europe against investor-state dispute resolution system.

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<sup>53</sup> <<https://energycharter.org/who-we-are/members-observers/>> accessed 7 September 2017.

<sup>54</sup> The International Energy Charter: Consolidated Energy Charter Treaty with Related Documents (The Energy Charter Treaty) [2016] <<https://energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf>> accessed 7 January 2018.

<sup>55</sup> Ibid Part III.

<sup>56</sup> Ibid Art 26.

<sup>57</sup> <<http://investmentpolicyhub.unctad.org/ISDS/FilterByCountry>> (accessed 9 September 2017)

<sup>58</sup> Charles A Patrizie and others, 'Investment Disputes Involving the Renewable Energy Industry under the Energy Charter Treaty' (*Global Arbitration Review*) <<http://globalarbitrationreview.com/chapter/1142579/investment-disputes-involving-the-renewable-energy-industry-under-the-energy-charter-treaty>> accessed 9 September 2017.

<sup>59</sup> All above mentioned investor-state claims are accessible via the UNCTAD's Investment Dispute Settlement Navigator: <<http://investmentpolicyhub.unctad.org/ISDS>> accessed 17 January 2018.

<sup>60</sup> *Vattenfall AB and Others v Federal Republic of Germany*, ICSID Case No. ARB/12/12 (2 July 2013).

The considerable change in circumstances of the EU capital exporting Member States occurred after the Council's statement on the future of the EU's investment policy in which the Member States insisted that the EU's investment agreements should increase the level of protection for foreign investors.<sup>61</sup> As the EU capital exporting Member States have been visibly controlling the position of the Council, the escalating number of investor-state claims against them works in favour of the Commission's efforts to reform the system of BIT protection in a manner that increases states' flexibility to enact regulation in the public interest. In fact, signs of a shift in attitude of the Member States were visible when in one its meeting that followed the submission of the abovementioned claims by investors, the Council supported the Commission's 'renewed pledge to respect governments' right to regulate.'<sup>62</sup> It, therefore, appears that more Member States may be coming to a realisation that in the absence of a holistic reform, the number of claims against them is likely increase overtime. Moreover, in the light of changing direction of investment flows, Italy's solution of simply denouncing the Energy Charter Treaty, in the long term, will not solve the predicament that the developed EU Member States have found themselves in.<sup>63</sup>

Further endorsement of the Commission's action can be observed in the fact that the Council approved the final text of CETA, which departed from the negotiating directives.<sup>64</sup> As highlighted in the CJEU's case law, it is the Council's prerogative to reject the final agreement, if it disapproves of the negotiating outcome.<sup>65</sup> In case of mixed agreements, however this power is also enjoyed by each Member State and has been exercised by Wallonia during the signature of the abovementioned agreement.<sup>66</sup> Although many opined that this has been damaging to the EU's position on the international scene,

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<sup>61</sup> Council, 'Conclusions on a Comprehensive European International Investment Policy' 3041<sup>st</sup> Foreign Affairs Council Meeting (25 October 2010), para 8.

<sup>62</sup> Council, 'Outcome of the Council Meeting. 3430<sup>th</sup> Council meeting. Foreign Affairs. Trade Issues', 27 November 2015, para 11

<sup>63</sup> After having a number of claims filed against it, Italy has denounced the Energy Charter Treaty. On 31 December 2014, Italy notified its withdrawal, which took effect on 1 January 2016. <<http://www.energycharter.org/who-we-are/members-observers/countries/italy/>> (accessed 07 September 2017).

<sup>64</sup> Council, 'The Council Decision on the Signing on Behalf of the European Union of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the One Part, and the European Union and Its Member States on the Other Part', WTO 194 Services 19 FDI 15 CDN 11.

<sup>65</sup> T-226/04 *Commission v Italy* [2006] ECR II-00029, paras 76 and 78; Case C-425/13 *Commission v Council* [2015] OJ C311/2, Opinion of AG Wathelet, para 72; TFEU, Art 218(5) and 218(6).

<sup>66</sup> Hans von der Burchard, Simon Marks and Alberto Mucci, 'Wallonia Sends EU Trade Policy Back to the Drawing Board' *Politico* (Europe Edition 24 October 2016) <<https://www.politico.eu/pro/pm-charles-michel-tells-eu-that-belgium-cannot-sign-canada-deal/>> accessed 7 January 2018.

the compromise has eventually been found and from the perspective of the process of integration, this event may create further pressures for complete transfer of competences in the sphere of investment.<sup>67</sup> Notwithstanding, the signature of CETA does not indicate unequivocal support of all aspects of the Commission's reform plans. First of all, CETA introduces only the first phase of the reform of the dispute resolution system, which has been evaluated in greater detail in the section below. Secondly, Belgium's ratification of the agreement is conditional upon the Court's ruling on the compatibility of the investor-state dispute resolution system with EU law, which will determine lawfulness and feasibility of the Commission's action.<sup>68</sup> Consequently, there is still a lot of work ahead of the Commission to persuade the Member States that the EU is best placed to lead the change of the investment protection system. The section below evaluates the most contentious aspects of the Commission's reform proposal.

### **3.4. The Commission's Reforms of the International Investment System**

#### **3.4.1. Paving the way for the EU international investment policy**

In order to cultivate further integrative pressures in the area of international investment, the Commission has aimed to establish a presence on the international scene to emerge as a global leader, similarly to its position at the WTO. However, this was never going to be an easy task given the well-established position of the Northern American States, as well as, other EU Member States. Thus, the initial strategy of the Commission was aimed at improving its visibility on the international scene through pursuing actions on multiple fronts. In addition to starting investment negotiations with countries that establish current standards in the treaty-drafting practice, i.e. Canada and the US, the Commission has also supported work of UNCITRAL on the new transparency rules in investor-state dispute resolution by making financial contributions.<sup>69</sup> The Commission has also marked its presence in investor-state disputes pursuant to the existing Member States' BIT, either

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<sup>67</sup> Pieter-Jan Kuijper, 'Post-CETA: How We Got There and How to Go on' (*Blog Active EU* 28 October 2016) <<https://acelg.blogactiv.eu/2016/10/28/post-ceta-how-we-got-there-and-how-to-go-on-by-pieter-jan-kuijper/>> accessed 07 January 2018; David Kleimann and Gesa Kübec, 'The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU: The Case of CETA and Opinion 2/15' (2016) EUI Working Paper No 2016/58 <<http://cadmus.eui.eu/handle/1814/43948>> accessed 07 January 2018.

<sup>68</sup> Court of Justice, 'Request for an Opinion Submitted by the Kingdom of Belgium Pursuant to Article 218(11) TFEU (Opinion 1/17)' OJ C369/2. See: Chapter 6 for detailed evaluation of this issue.

<sup>69</sup> European Commission, EU to Continue Its Support of the Operation of UNCITRAL Transparency Registry for a Further Three Years <[trade.ec.europa.eu/doclib/press/index.cfm?id=1603](http://trade.ec.europa.eu/doclib/press/index.cfm?id=1603)> accessed 4 January 2017.

indirectly impacting on the party submissions,<sup>70</sup> or by filling *amicus curiae* briefs in a number of cases.<sup>71</sup> Eventually, the Commission has expressed the intention to incorporate rules on investment protection in the WTO and has not been shy to present itself as the international actor that is best placed to lead this kind of change.<sup>72</sup>

Insofar as eliminating competition from the Member States for a position of a global leader in the field of international investment is concerned, the Commission has been trying hard to eradicate their existing networks of BITs. The process started already prior to the entry into force of the Treaty of Lisbon 2009, with the Commission bringing infringement proceedings against Finland, Denmark and Sweden.<sup>73</sup> In these cases the Commission successfully challenged the compatibility of the third-country BITs concluded by the Member States with EU law. The CJEU ruled that the transfer provisions contained in BITs, which do not permit for temporary suspension of flow of capital and payments were not compatible with the EU Treaty.<sup>74</sup> Thus, in accordance with the provision in Article 351 TFEU, such agreements should be either amended or denounced. Secondly, the Commission also sought to eliminate pre-existing Member States BITs on a more systemic scale with the Transitional Regulation.<sup>75</sup> However, as evaluated in greater detail in Chapter 5, the Council has significantly curbed the Commission's powers to 'weed out' undesired Member States' investment treaties. As a consequence, the implementation of the Commission's strategy to substitute the Member

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<sup>70</sup> *Eastern Sugar B.V. v. Czech Republic*, Arb. Inst. Stockholm Chamber of Com. Case No. 088/2004, Decision (12 April 2007).

<sup>71</sup> *Achmea B.V. v. The Slovak Republic*, PCA Case No. 2008-13, Award (7 December 2012); *AES v Hungary*, ICSID Case No. ARB/07/22, Award (23 September 2010); *Micula v Romania*, ICSID Case No. ARB/05/20, Award (11 December 2013); *Electrabel v Hungary*, ICSID Case No. ARB/07/19, Award (25 November 2015); *European American Inv. Bank AG v. Slovak Republic*, PCA Case No. 2010-17, Award (20 August 2014); *U.S. Steel Glob. Holdings I B.V. (Neth.) v. Slovak Republic*, PCA Case No. 2013-6, Discontinued; *Charanne B.V. v. Kingdom of Spain*, Arb.Inst. Stockholm Chamber of Com. Case No. 062/2012, Award 21 January 2016; *Antin Infrastructure Servs. Lux. S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/31; *Eiser Infrastructure Ltd. v. Kingdom of Spain*, ICSID Case No. ARB/13/36; Award (4 May 2017).

<sup>72</sup> Commission (n 12) 23.

<sup>73</sup> Case C-118/07 *Commission v Finland* [2009] ECR I-10889; Case C-249/06 *Commission v Sweden* [2009] ECR I-01335; Case C-205/06 *Commission v Austria* [2009] ECR I-01301.

<sup>74</sup> *Ibid.*

<sup>75</sup> Regulation 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries [2012] OJ L351/40 (Transitional Arrangements Regulation).

States in the field of international investment may take considerably longer, than the institution would have wished for.<sup>76</sup>

The Commission's actions against so called intra-EU BITs have been more effective, which can be considered as an incremental step towards replacing Member States as actors in the sphere of international investment. Intra-EU BITs is a term that has been commonly used in the literature to describe treaties that were concluded between two EU Member States, before one of them acceded to the EU and continued to be enforced post-accession.<sup>77</sup> There are currently around 190 intra-EU BITs.<sup>78</sup> Since the inception of the EU investment policy the Commission has made it clear that it considers these treaties to be incompatible with EU law.<sup>79</sup> On that basis, the Commission challenged jurisdiction of investment tribunals in investor-state cases, albeit each time unsuccessfully.<sup>80</sup> The Commission also issued a decision against Romania on grounds that payment of an award rendered under Romania-Sweden BIT constituted illegal state aid<sup>81</sup> and more recently threatened to pursue similar actions against Spain, if it considers payment of awards in disputes concerning withdrawal of subsidies in the renewable sector.<sup>82</sup> The Commission's actions against intra-EU BITs culminated in the commencement of infringement proceedings against five EU Member States for failure to terminate the

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<sup>76</sup> Since the entry into force of the Treaty of Lisbon Member States concluded 44 of new BITS, which do not implement the Commission's reform. <<http://investmentpolicyhub.unctad.org/IIA/>> accessed 27 January 2018.

<sup>77</sup> Examples include: Michele Potestà, 'Bilateral Investment Treaties and the European Union. Recent Developments in Arbitration and Before ECJ' (2009) 8 *The Law and Practice of International Court and Tribunals* 225; Thomas Eilmansberger (n 28); August Reinisch, 'The EU on the investment Path- *Quo Vadis* Europe? The Future of EU BITs and Other Investment Agreements' (2013-2014) 12 *Santa Clara J. Int'l L.* 111.

<sup>78</sup> At the time of writing, UNCTAD database specified that there 159 of intra-EU BITs in force, although it is known that some Member States, e.g., Romania, Poland either took actions towards terminating them, or expressed their intentions to do so. <<http://investmentpolicyhub.unctad.org/IIA>> accessed 7 January 2017.

<sup>79</sup> For a comprehensive assessment of the Commission's arguments and their validity see: Eirik Bjorge, 'EU law Constraints on Intra-EU Investment Arbitration?' (2017) 16 *The Law and Practice of International Courts and Tribunals* 71.

<sup>80</sup> The most notable cases include: *Eastern Sugar B.V. v. Czech Republic*, Arb. Inst. Stockholm Chamber of Com. Case No. 088/2004, Decision (12 April 2007); *Achmea B.V. v. The Slovak Republic*, PCA Case No. 2008-13, Award (7 December 2012); August Reinisch, 'Articles 30 and 59 of the Vienna Convention on the Law of Treaties in Action: The Decisions on Jurisdiction in the *Eastern Sugar* and *Eureko* Investment Arbitrations' (2012) 39 *Legal Issues of Economic Integration* 157.

<sup>81</sup> Commission, 'Decision 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania — Arbitral award Micula v Romania of 11 December 2013', OJ L232/43.

<sup>82</sup> Commission, 'State Aid SA.40348 (2015/NN) – Spain: Support for Electricity Generation from Renewable Energy Sources, Cogeneration and Waste' C(2017) 7384 final.

infamous treaties.<sup>83</sup> The fate of the intra-EU BITs is being currently decided by the CJEU in the case *Achmea v Slovakia*, which has been referred by the German Federal Court who asked about the compatibility of Netherlands- Slovakia BIT with EU law<sup>84</sup>.

Removal of over 190 existing investment treaties would considerably change the investment protection landscape in the EU. Although the Commission considers that the EU Treaties offer the same guarantees, the intra-EU BITs remain popular among European investors, who maintain their capital in the internal market. This observation is supported by UNCTAD statistics, which indicated that in 2015, the total number of investor-state disputes pursuant to intra-EU BITs constituted approximately 19 per cent of all known cases globally.<sup>85</sup> The attitude of the Member States towards the Commission's action varies and depends on their general position in the field of international investment. Thus, the Member States, who are frequent respondents in the investor-State cases pursuant to intra-EU BITs support in principle the Commission's actions to eliminate them completely. Thus far, Italy and Ireland have terminated all of their intra-EU BITs<sup>86</sup> and Romania, Poland and Czech Republic have started the process<sup>87</sup>. More Member States will be required follow this trend if the CJEU declares in *Achmea* that the treaties are incompatible with EU law.

However, the capital exporting Member States are, as observed by Advocate General Wathelet, not in favour of the Commission's actions to terminate the intra-EU BITs. In 2015, in an unofficial 'non-paper', Austria, Finland, France, Germany and Netherlands proposed to phase out all treaties currently enforced between the Member States and to replace them with a more comprehensive multilateral agreement that offers the same substantive and procedural guarantees as the intra-EU BITs<sup>88</sup>. Although such a solution

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<sup>83</sup> Commission, Press Release: Commission asks Member States to terminate their intra-EU bilateral investment treaties (18 June 2015), <[http://europa.eu/rapid/press-release\\_IP-15-5198\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5198_en.htm)> accessed 04 January 2017.

<sup>84</sup> Case C-284/16 *Slovak Republic v Achmea BV* [2017] Opinion of AG Wathelet.

<sup>85</sup> UNCTAD, 'IIA Issues Note No 2' (2016), 4.

<sup>86</sup> <<http://investmentpolicyhub.unctad.org/IIA/>> accessed 27 January 2018.

<sup>87</sup> Crina Baltag, 'Green Light for Romania to Terminate its Intra-EU Bilateral Investment Treaties' (*Kluwer Arbitration Blog* 14 March 2017)< <http://arbitrationblog.kluwerarbitration.com/2017/03/14/green-light-for-romania-to-terminate-its-intra-eu-bilateral-investment-treaties/>> accessed 27 January 2018; Marcin Orecki, 'Let the Show Begin: Poland Has Commenced the Process of BITS' Termination' (*Kluwer Arbitration Blog* 8 August 2018) <<http://arbitrationblog.kluwerarbitration.com/2017/08/08/let-show-begin-poland-commenced-process-bits-termination/>> accessed 30 January 2018.

<sup>88</sup> Intra-EU Investment Treaties: Non-paper by Austria, Finland, France, Germany and the Netherlands <<https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/publicaties/2016/05/18/non-paper-investeringsbescherming-tussen-eu-lidstaten/intra-eu-investment-treaties-non-paper.pdf>> accessed on 27 January 2018.

definitely favours capital exporting Member States and their investors who frequently utilise protection offered by investment treaties<sup>89</sup>, it could, on the other hand, be detrimental to capital importing countries, by increasing a risk of investment claims being filed against them. In the light of the diverging circumstance of the Member States and lack of enthusiasm from the Commission, the proposal is unlikely to succeed. Nonetheless, the position of the capital exporting Member States may delay the Commission's plans to neutralise the effects of the intra-EU BITs, the majority of which contain a sunset clause. These provisions allow to maintain the effectiveness of the treaty with regards to investment established prior to the termination, in many cases for ten or twenty years.<sup>90</sup> States may mutually agree not to apply them; however, this will require either sincere cooperation on the part of all Member States, which may be difficult to foster in current circumstances, or a ruling from the CJEU to that effect.

Although the Commission has started in the field of international investment, as pointed out by Pantaleo and Andenas, with “no experience, no expertise and no practice,”<sup>91</sup> its actions have shaken the European landscape and are expected further to impact on the system of protection of FDI. In this context the Commission has made important steps towards establishing a strong position *vis-à-vis* the Member States with offences on multiple fronts against their existing networks of BITs. Although the Commission's actions have received a mixed reaction, the institution has not been shy to present itself in the latest policy document as a global leader that is best placed to steer the reform of the entire investment protection regime.<sup>92</sup> For the long term, the Commission expressed an objective of incorporating the investment protection rules into the WTO<sup>93</sup>, which is a very ambitious task, especially if considered in the light of the previous unsuccessful attempt to do so.<sup>94</sup> The aim, nonetheless, is consistent with the principles of the EU external action set out in Article 21 TEU, which expressly provides that the Union “shall

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<sup>89</sup> Out of total of 152 claims arising pursuant to intra-EU BITs, 85 claims were brought by investors from pre-2004 Member States against the states that acceded to the EU in and after 2004. Investors from Central and Eastern European States brought only 5 claims against the pre-2004 Member States. <<http://investmentpolicyhub.unctad.org/ISDS>> accessed 27 January 2018.

<sup>90</sup> For example the Germany-Bulgaria BIT provides that certain treaty provisions remain effective for 15 years after termination, see: Treaty Concerning the Reciprocal Encouragement and Promotion of Investments (with Protocol and Exchange of letters) (signed 12 April 1986, entered into force 10 March 1988), Art 11(3).

<sup>91</sup> Luca Pantaleo and Mads Andenas, ‘Introduction: The European Union as a Global (Legal) Role Model for Trade and Investment?’ (2017) 28 EBLR 99.

<sup>92</sup> Commission (n 12) 22.

<sup>93</sup> Commission (n 12) 22.

<sup>94</sup> Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP 2014), 72-75.

promote multilateral solution to common problems”. Consequently, the EU’s first investment chapters, which are evaluated in the section below, could have a systemic significance as vehicles generating future multilateral norms.

### **3.4.2. Objective of the Commission’s Reform**

The Commission’s ability to establish strong position in international investment is essential for the success of its reform proposals, especially in the light of the ambitious changes it has proposed. The extent of the Commission’s amendments to the European investment treaty-making practice was not immediately apparent, because the initial Communication referred to the existing Member States BITs as one of the sources of inspiration for the EU’s comprehensive international investment policy.<sup>95</sup> Thus, given the Commission’s lack of experience it was not unreasonable to assume that the first generation of the EU international investment treaties would follow the European ‘gold standard’.<sup>96</sup> However, as transpired later the Commission’s vision for the EU’s investment agreements has differed considerably from the past and current practice of the EU Member States,<sup>97</sup> who as observed by Paparinskis were satisfied to continue with the European Model BIT, whilst other meaningful actors were introducing State-friendly amendments.<sup>98</sup> The Member States’ initial content with the *status quo* was visible in the negotiating directives issued to the Commission. The Commission, however, has made a strong commitment to reshape the system of investment protection. In the 2015 ‘Trade for All’ strategy it stated: ‘the question is not whether the system should be changed but how this should be done’.<sup>99</sup>

The EU investment chapters that have been negotiated to date contain some noteworthy reform which is evaluated in greater detail in the section below. In this context, the Commission’s main objectives were to rebalance the investment protection agreements in favour of the states’ right to regulate and to improve the legitimacy of the dispute resolution system.<sup>100</sup> Clearer definitions of substantive standards, inclusion of express language reaffirming states’ right to regulate and a substantial reform of the investor-state dispute resolution system have been the primary means through which the Commission

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<sup>95</sup> COM (2010) 343 final, 11.

<sup>96</sup> Lavranos (n 36).

<sup>97</sup> Martin Paparinskis, ‘International Investment Law and the European Union: A Reply to Catharine Titi’ (2015) 26 EJIL 663, 668; Ripinsky and Rosert (n 32) 18-19.

<sup>98</sup> Paparinskis (n 97) 668.

<sup>99</sup> Commission (n 12) 22.

<sup>100</sup> Ibid.



sought to attain its commitments.<sup>101</sup> This approach, albeit containing some significant variations, aligns the EU's investment agreements with the new trend in international investment law, aimed at limiting arbitral tribunals' discretion through more precise drafting of the substantive standards, which was pioneered by the Northern American states based on their NAFTA experience.<sup>102</sup> The precision in treaty drafting, however, is not a common characteristic of the European BITs.<sup>103</sup>

In this context, it is important to note that the ambiguity in the formulation of the substantive provisions in investment treaties favours foreign investors.<sup>104</sup> Consequently, the 'rebalancing' of the investment treaties, which the Commission proposed, effectively means a lowering of the protection standards, in comparison to the Member States' BITs.<sup>105</sup> Such a solution benefits the EU Member States that are net importers of investment and those that have been respondents in many investor-state claims.<sup>106</sup> However, the second group of the EU Member States, which constitutes of the net capital exporters may be dissatisfied with these new norms, as their investors abroad have been frequently invoking current, vaguely formulated investment standards. The investors from Netherlands, United Kingdom, Germany and France have sued the host states most often under the BIT negotiated by their home countries.<sup>107</sup> After the implementation of the new provisions in the EU investment treaties it may be more difficult for investors to bring claims and be successful in investor-state arbitration. However, in the light of changing investment flows and given the fact that the new common policy encompasses not only developing countries, but also developed ones, such as Canada, USA, Japan and Singapore changes in investment treaties that allow greater flexibility for states may turn out to be beneficial for the capital exporting Member States too.<sup>108</sup>

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<sup>101</sup> Commission, 'Investment in TTIP and Beyond- the Path for Reform: Enhancing the Right to Regulate and Moving from Current Ad Hoc Arbitration Towards Investment Court (Concept Paper)', 2.

<sup>102</sup> UNCTAD (n 11) 124; Flavien Jadeau and Fabien Gélinas, 'CETA's Definition of the Fair and Equitable Treatment Standard: Toward a Guided and Constrained Interpretation' (2016) 13 *Transnational Dispute Management*, 13-15 <[www.transnational-dispute-management.com](http://www.transnational-dispute-management.com)> accessed 06 January 2017.

<sup>103</sup> Ripinsky and Rosert (n 32) 18-19.

<sup>104</sup> UNCTAD (n 11) 124.

<sup>105</sup> Vaughan Lowe, 'Regulation or Expropriation?' (2002) 55 *Current Legal Problems* 447.

<sup>106</sup> The Member States with the largest number of investment claims filed against them include: Spain 36, Czech Republic 35, Poland 24, Hungary 14, Romania 13, Slovakia 13, Italy 9, Latvia 8. <<http://investmentpolicyhub.unctad.org/ISDS>> accessed 8 January 2018.

<sup>107</sup> Investors from Netherlands brought 96 known cases, UK 69, Germany 57, France 41, Luxembourg 37, Italy 34. <<http://investmentpolicyhub.unctad.org/ISDS>> accessed 8 January 2017.

<sup>108</sup> The EU has concluded treaties with Vietnam and Canada and is currently negotiating with: Egypt, India, Indonesia, Japan, Jordan, Malaysia, Mercosur, Mexico, Morocco, Philippines, Singapore, Tunisia, the USA, China and Myanmar. <[ec.europa.eu/trade/policy/accessing-markets/investment/](http://ec.europa.eu/trade/policy/accessing-markets/investment/)> 2 January 2018.

### **3.4.3. Commission's Reform**

The Commission has proposed innovative changes to the drafting of the investment protection treaties. As outlined below, the EU investment agreements significantly depart from the practice that the Member States established in the field. The Commission's reform has a potential of benefiting all Member States and its acceptance would constitute a strong endogenous pressure for continued action of the Union in the field of investment and further transfer of competences. However, unequivocal approval of the Commission's actions by all Member States is currently missing, which has been manifested in the refusal to grant provisional application to the first investment chapter negotiated by the Union.<sup>109</sup> This significantly weakens the position of the Commission by delaying its reforms from taking effect. However, the Commission has not just relied on endogenous pressures and has sought to create exogenous spillover by proclaiming intentions to, not only, establish a multilateral investment court, but also multilateral rules on investment protection.<sup>110</sup> Creation of a multilateral system for protection of investment has to be considered as a long-term and high risk endeavour. The section below evaluates the main points of contention between the Commission's reforms and the treaty making practice of the Member States that could stand in the way of the development of the common international investment policy and future integration in the CCP.

#### **i. Reaffirming State's Right to Regulate**

The first of the Commission's innovations in the treaty drafting practice evaluated in this section concerns the effects of the investment treaties on the freedom of states to pass legislation in public interest. To that end, chapters negotiated to date by the EU contain express language in the preamble, which specifies that the investment protection guarantees offered must be applied in a manner that does not undermine the right of the parties to regulate.<sup>111</sup> This approach is a considerable change of tone in comparison to the existing Member States' BITs which in general emphasise the aim of ensuring the highest

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<sup>109</sup> Council, 'Council Decision on the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part' 10974/16 WTO 196 Services 21 FDI 17 CDN 13' WTO 194 Services 19 FDI 15 CDN 11 (Decision on Provisional Application of CETA).

<sup>110</sup> Commission (n 8) 22.

<sup>111</sup> Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part and the European Union on and its Member States, of the other part (CETA)(signed 30 October 2018) [2017] OJ L11/23, Preamble, Recital 5.

levels of investment protection.<sup>112</sup> Furthermore, the investment chapters in the EU's new deep and comprehensive economic agreements also include detailed provisions, which in no ambiguous terms confirm that ensuring states' regulatory flexibility is a binding commitment.<sup>113</sup> The Commission's aim behind introducing such provisions is to limit possibilities for foreign investors challenging host states' decisions to change regulatory framework in public interests, or withdraw subsidies and speaks to the general public demands as well as current international trends in the treaty drafting practice.<sup>114</sup>

Although precise effects of these clauses are yet to be determined in future cases pursuant to the EU's new investment treaties, it currently appears that their inclusion does not go hand in hand with the Council's objectives to increase the level of investor protection. However, the Member States' approval of the signature of CETA may signify a slight shift in attitude, in particular of the capital exporting Member States, which in the beginning seemed to control the position of the Council.<sup>115</sup> Though, this conclusion should be taken with caution, as none of the pre-2004 Member States have concluded BITs with Canada,<sup>116</sup> hence the new EU investment chapter does not reduce the level of protection enjoyed by their investors abroad. Moreover, as the provisional application of the investment part of the agreement has been precluded by the Member States, their approval of the Commission's action will be tested in the conclusion of future EU investment treaties.<sup>117</sup>

## **ii. Non-discrimination Standards**

In addition to the inclusion of express language that reaffirms states' right to regulate, the Commission has also implemented changes to the drafting of the substantive standards traditionally found in BITs. In this context, the Commission introduced far-reaching amendments of the non-discrimination standards commonly found in Member States' BITs.

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<sup>112</sup> For example: France 2006 Model BIT, German 2008 Model BIT, Italian 2003 Model BIT. <<https://www.italaw.com/investment-treaties>> 8 January 2018.

<sup>113</sup> CETA, Article 8.9; EU-Vietnam Free Trade Agreement: Agreed Text as of January 2016 (EU-Vietnam FTA), 13bis <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>> accessed 8 January 2018.

<sup>114</sup> Commission (n 12); UNTAD (n 12).

<sup>115</sup> Council, 'The Council Decision on the signing on behalf of the European Union of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States on the other part', WTO 194 Services 19 FDI 15 CDN 11.

<sup>116</sup> CETA, Annex 30-A.

<sup>117</sup> Decision on Provisional Application of CETA.

As cornerstones of the global trading system, the national treatment and most-favoured-nation (MFN) treatment feature in the EU's investment agreements,<sup>118</sup> though the scope of the MFN provision has been significantly limited as it does not apply to the dispute resolution provisions and substantive standards in third-country treaties.<sup>119</sup> These changes constitute a significant departure from the Member States' BITs, which continue to use vaguely formulated and potentially all-encompassing MFN provisions and some expressly specify that the clause applies to dispute resolution mechanism.<sup>120</sup> The new drafting that prohibits application MFN clauses to procedural rules has been widely adopted by other states,<sup>121</sup> as it is considered to improve legal certainty given the unsettled nature of the debate concerning this issue.<sup>122</sup> On the other hand, the decision to exclude substantive standard may prove problematic to the Commission. This is not only a noteworthy deviation from the treaty-making practice of the Member States, but also from the well-established interpretation of the MFN clauses.<sup>123</sup> Although some commentators questioned the rationale behind such a sharp departure from the *status quo*,<sup>124</sup> the reform is in line with the UNCTAD's recommendation and similarly to the exclusion of procedural standards, its aim is to prevent any past or future treaties from undermining the implemented reforms.<sup>125</sup>

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<sup>118</sup> COM (2010) 343 final, 8. CETA, Arts 8.6 and 8.7. EU-Vietnam FTA, Art 4; The EU-Singapore FTA, which at the time of writing was initialled, but not yet concluded, does not contain a most-favoured-nation treatment clause. However, the agreement is currently under a review. EU-Singapore Free Trade Agreement. Authentic Text as of May 2015 <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>> accessed 15 September 2017.

<sup>119</sup> CETA, Art 8.5; EU-Vietnam FTA, Art 4.

<sup>120</sup> Some Member States, such as Austria for example, expressly include dispute resolution procedure in the scope of the MFN provisions. See for example: Austria Model BIT 2008, Art 3; United Kingdom Model IPPA (2008), Art. 3. The following Member States continue to use vaguely formulated standards: French Model BIT (2006), Art 5; Germany's Model BIT (2009), Art 3, Italian Model BIT 2003, Art III, Netherlands Model BIT Art 3. Chester Brown (ed.) *Commentaries on Selected Model Investment Treaties*, (OUP 2013)

<sup>121</sup> According to the UNCTAD's report 48% of investment treaties concluded between 2012 and 2014 exclude the dispute resolution procedure from the scope of application of the MFN clause. UNCTAD, 'Policy Options for IIA Reform: Treaty Examples and Data: Supplementary Material to World Investment Report 2015' (2015); UNCTAD (n 11) 136.

<sup>122</sup> International Law Commission, Special Rapporteur Endre Ustor, 'Second Report on the Most-Favoured-Nation Clause', [1970] 2 Y.B. Int'l L. Comm'n, UN Doc. A/CN.4/228 and Add. 1; International Law Commission, Final Report of the Study Group on the Most-Favoured National Clause [2015] 2 Y.B. Int'l Comm'n Annex, UN Doc. A/CN.4/606.

<sup>123</sup> N. Jansen Calamita and Ewa Zelazna, 'Most-Favoured-Nation Clauses and the Centrality and Limits of General Principles', Attila Tanzi, Andrea Gattini and Filippo Fontanelli, *General Principles of Law and International Investment Arbitration* (forthcoming, Brill 2018).

<sup>124</sup> Paparinskis (n 97) 668.

<sup>125</sup> UNCTAD (n 11) 130-131. Prior to the Treaty of Lisbon 2009, the EU has concluded only one agreement with investment protection rules, i.e. the Energy Charter Treaty, which follows the traditional European approach to the formulation of substantive standards. See for example vague definition of the fair and

However, these changes raise doubts about the future effectiveness of the MFN clauses. In the light of the narrowing down of the provision's scope, the number of situations in which the clause can be successfully invoked by an investor has been significantly limited.<sup>126</sup> Exclusion of all, past and future, substantive obligations from the definition of treatment precludes the dynamic evolution of investment protection standards in the EU's investment agreements and makes it more difficult to achieve a level playing field across all EU treaties. The dynamic evolution of the EU investment treaty making practice could have been ensured through inclusion of a temporal limitation on the scope of the MFN clause in order to ensure that investors can benefit only from future changes and not the past practice. Such an approach could be beneficial from the perspective of the EU, given the uncertain impact of the Commission's reforms, as well as the ambitious list of agreements it intends to negotiate. In the absence of an MFN clause that allows for importation of substantive standards from other treaties, the Commission will be required to amend each treaty each time it changes its approach.

Despite this disadvantage, such a limitation on the applicability of MFN provisions may be necessary to ensure future effectiveness of the Commission's reform. Given that the Member States can be individually responsible under the EU's investment agreements<sup>127</sup> and that their BITs will remain valid for the foreseeable future,<sup>128</sup> an MFN clause that encompasses substantive standards, could potentially allow for the importation of provisions from the existing Member State BITs. Since the treaty-making practice of the Commission and the Member States continue to differ even after the entry into force of the Treaty of Lisbon 2009,<sup>129</sup> this would have undermined the Commission's efforts to reform the investment protection system, both in the transitional period and potentially in the longer term, as the Member States expressed an intention to continue concluding investment treaties independently of the Union.<sup>130</sup> As a result the formulation of MFN clauses in EU investment treaties is very complex with multiple layers of exclusions and

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equitable treatment in, or broad scope of the expropriation clause. The Energy Charter Treaty, Arts 10 and 13.

<sup>126</sup> UNCTAD recognised that the MFN provisions in International Investment Agreements have been mainly used by investors to import more favourable procedural or substantive provisions from third-party treaties. UNCTAD, 'Most-Favoured-Nation Treatment: A Sequel. UNCTAD Series on Issues in International Investment Agreements II' (United Nations Publications 2010), 18.

<sup>127</sup> Financial Responsibility Regulation.

<sup>128</sup> Transitional Arrangements Regulation

<sup>129</sup> See, for example: Agreement for the Promotion and Protection of Investment between the Government of the Republic of Austria and the Government of Kyrgyz Republic (22 April 2016).

<sup>130</sup> Council, 'Conclusion on a Comprehensive European International Investment Policy' 3041<sup>st</sup> Foreign Affairs Council Meeting (25 October 2010), para 10.

limitations that create legal uncertainty with respect to the provision's future effects.<sup>131</sup> This could make the Commission's task of persuading the Member States about the merits of its reform more difficult.

Another significant departure from the treaty-making practice of the Member States by the Commission has been inclusion of liberalisation commitments.<sup>132</sup> Traditionally, both the national treatment and MFN treatment clauses in the European BITs apply to investment which is already established. The effect of these provisions is that a host state retains full autonomy over the admission of foreign investment into its economy. The EU's investment treaties part with such an approach. In CETA and the EU-Vietnam FTA, non-discrimination provisions apply both to establishment and operation of investment.<sup>133</sup> These two treaties, however, intently require a different degree of investment liberalisation from third-country partners.

Since CETA involves two highly developed countries, the parties made a commitment, in principle, to fully open their economies, though a limited number of sensitive sectors has been excluded from the scope of the agreement.<sup>134</sup> The EU-Vietnam FTA, does not contain such extensive liberalisation requirements. Similarly to CETA, through adoption of a negative list, the agreement excludes some sectors completely.<sup>135</sup> However, unlike CETA, EU-Vietnam allows the parties to submit a positive list of sectors they are willing to open up to foreign investors.<sup>136</sup> Furthermore, the scope of the MFN provision with regards to the pre-establishment requirements has been significantly curbed and encompasses only a more favourable treatment granted to the third parties on the date of the EU-Vietnam FTA and excludes certain sectors completely from its application.<sup>137</sup>

The liberalisation commitments in EU investment treaties is a new development, which could be a building block towards including the investment protection rules in the WTO.<sup>138</sup> Their limited effectiveness caters to interests of developing states, which historically have been a stumbling block in the negotiations concerning multilateral

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<sup>131</sup> EU-Vietnam FTA, Art 4(4); CETA, Art 8.7.

<sup>132</sup> The only EU Member State that has started to include pre-establishment clauses is Finland. See: UNCTAD (n 11), 110.

<sup>133</sup> EU-Vietnam FTA, Art 4; CETA, Art 8.7.

<sup>134</sup> CETA, Art 8.2.

<sup>135</sup> EU-Vietnam, Art 1.

<sup>136</sup> Ibid Art 5.

<sup>137</sup> Ibid Art 4.

<sup>138</sup> Commission (n 12) 22.

investment agreement. However, multiple exclusions that were incorporated in the EU's new investment treaties lower standards of investment protection in comparison the past and current Member States' BITs, which may intensify internal opposition against the Commission's action in the field of investment.

### **iii. Investment Protection Standards**

Apart from reforming the non-discrimination provisions in EU agreements, the Commission has also modified the most basic investment protection guarantees, such as protection against expropriation and fair and equitable treatment (FET). Some of these amendments follow the recent reform trends influenced by the NAFTA experience<sup>139</sup> and some are original ideas of the Commission. In this context the Commission has been criticised for not seeking inspiration closer to home.<sup>140</sup> These policy choices could have negative impact on securing the Member States' support of the reform, which significantly departs from the norms they have previously established.

The expropriation clauses in the EU investment agreements preserve the basic investment protection standard that features in the EU Member States treaties. Similarly to the modern BIT practice, the EU agreements prohibit taking of foreign investment, unless it is done for public purpose, under due process, in a non-discriminatory manner and upon payment of compensation equivalent to the fair market value of investment.<sup>141</sup> However, inspired by the Northern American experience,<sup>142</sup> the EU treaties include definitions of both direct and indirect expropriation, with the latter specifying that measures applied to protect "legitimate public welfare objectives, such as health, safety and the environment do not constitute indirect expropriation" unless they are manifestly excessive. This exception, which does not feature in the BITs of EU Member States,<sup>143</sup> constitutes a considerable narrowing of the scope of the clause, which gives states greater regulatory flexibility, but at the same time increases risk for foreign investors.

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<sup>139</sup> Maria Marceddu, 'The Emerging Profile of the European IIAs' 13(1) *Transnational Dispute Management* <[www.transnational-dispute-management.com](http://www.transnational-dispute-management.com)> accessed 06 January 2017.

<sup>140</sup> Paparinskis (n 97) 668.

<sup>141</sup> Nico Schrijver and Vid Prislán, 'The Netherlands' in Chester Brown (ed) *Commentaries on Selected Model Investment Treaties* (OUP 2013), 93-96, 573-577.

<sup>142</sup> Céline Lévesque and Andrew Newcombe, 'Canada' in Chester Brown (ed) *Commentaries on Selected Model Investment Treaties* (OUP 2013), 93-96.

<sup>143</sup> See for example: Austria Model BIT 2008, Art 7; United Kingdom Model IPPA (2008), Art. 5; French Model BIT (2006), Art 5; Germany's Model BIT (2009). Art 4, Italian Model BIT 2003, Art V, Netherlands Model BIT Art 6. Chester Brown (ed) *Commentaries on Selected Model Investment Treaties*, (OUP 2013).

Furthermore, the expropriation provisions in the EU's agreements specify that measures which merely deprive investors of some profits do not amount to indirect expropriation.<sup>144</sup> The change in the treaty drafting can be probably explained by the desire to appease the growing number of critics of the international investment regime and an attempt to legitimise the system, but does not depart from the interpretation commonly utilised by the investment tribunals.<sup>145</sup> CETA also includes 'investment backed-expectations' in the list of criteria for determining whether a state's action amounts to an indirect expropriation.<sup>146</sup> This concept is derived from the US domestic takings jurisprudence, which found its way into the Canadian Model BIT.<sup>147</sup> Its purpose is to ensure objective enquiry into reasonableness of the investor's expectation by bringing into the analysis a range of factors, in particular regulatory climate existing at a time, and the nature of the industry sector.<sup>148</sup> However, the subsequent negotiations undertaken by the Commission, imply that the 'investment backed-expectations' may not permanently feature in the EU investment agreements, as the concept has been omitted from the EU-Vietnam FTA.<sup>149</sup>

Although the Commission's main strategy for increasing states' regulatory flexibility is to improve clarity and precision in the drafting of the substantive standards,<sup>150</sup> the new expropriation clauses create some future interpretative challenges. For example, the annex on expropriation incorporates elements of proportionality analysis, through the use of concepts such as 'manifestly excessive regulatory measures',<sup>151</sup> which leaves a considerable discretion to the dispute resolution body to ascertain the clause's precise meaning and effect.

The Commission displayed more innovative approach with respect to the amendments proposed to the FET.<sup>152</sup> Traditionally, the provision has been designed to protect investors against arbitrary, unfair or abusive practices, however, its vague formulation,

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<sup>144</sup> CETA, Annex 8-A 2(a); EU-Vietnam FTA, Annex [] 2a.

<sup>145</sup> Rudolf Dolzer, 'Indirect Expropriations: New Developments' (2002) 11 N.Y.U. Envtl L.J. 64, 79; Ursula Kriebaum, 'Expropriation' in Bungenberg and others *International Investment Law: A Handbook* (C.H. Beck, Hart, Nomos 2015), 982.

<sup>146</sup> CETA, Annex-8A 2(c).

<sup>147</sup> Lévesque and Newcombe (n 141) 95.

<sup>148</sup> Lee M Caplan and Jeremy K Sharpe 'United States' in Chester Brown (ed) *Commentaries on Selected Model Investment Treaties* (OUP 2013), 790-791.

<sup>149</sup> EU-Vietnam FTA, Annex [] Expropriation.

<sup>150</sup> Commission (n 101) 2.

<sup>151</sup> CETA Annex 8-A, 3; EU Vietnam FTA, Annex [] Expropriation 3.

<sup>152</sup> Martins Paparinskis (n 97) 668.



which is characteristic for Member States' BITs, have sometimes led to generous interpretation granted in favour of foreign investors at the expense of states regulatory flexibility.<sup>153</sup> The changes introduced by the Commission were designed with an aim to limit the discretion offered to investment tribunals by including a list of specific instances in which a state can be found in breach of FET.<sup>154</sup> Additionally, the state parties have made commitments to maintain full control over any changes that may occur in the application of the standard through a specialist committee which may issue binding interpretation after the entry into force of the treaty.<sup>155</sup>

Another modification that the Commission has introduced to the formulation of the FET was to ensure that legitimate expectations of investors do not unduly limit states' capability to introduce legislative changes. To that end, the agreements concluded to date specify that legitimate expectations of an investor should be derived from an express representation, i.e. a written statement made by a state.<sup>156</sup> Furthermore, the precision in drafting is improved by the fact that the EU clauses do not follow Northern American treaty-making practice by linking FET to the customary law standards, a definition of which has been problematic to ascertain.<sup>157</sup> Consistently, with the Commission's reform objectives of all these amendments narrow down the scope of protection offered by the clause to foreign investors and increase the states' regulatory space. Similarly to all other amendments evaluated in this section, this approach contrasts with that adopted by the Member States in their treaties.

Notwithstanding the innovations proposed to the formulation of substantive standards, the Commission's most radical proposal concerns the investor-state dispute resolution mechanism. The system has always been considered as an essential part of the EU investment treaties, ensuring their effective enforcement. However, already in the initial Communication, the Commission has pointed out flaws in the traditional solution implemented in the Member States' BIT. For example, it identified as problematic "atomisation of disputes and interpretation" and mentioned a possibility of using quasi-permanent arbitrations and/or appellate mechanisms.<sup>158</sup>

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<sup>153</sup> Vaughan Lowe (n 105) 450, 454-456.

<sup>154</sup> CETA, Art 8.10(2); EU-Vietnam FTA, Art 14.

<sup>155</sup> CETA Art 8.10(3), EU-Vietnam FTA, Art 14(3).

<sup>156</sup> Ibid.

<sup>157</sup> Commission (n 101) 5-6.

<sup>158</sup> COM (2010) 343 final 9.

In the context of the reform of the dispute resolution mechanism, it can be observed that the Commission has pursued its strategy in an incremental, neofunctionalist manner. The first EU treaty, which has been negotiated with Singapore implemented modest changes to the well-established Member States' practice. Amendments in the EU-Singapore FTA introduced a closed list of arbitrators available for selection by the parties to a dispute and a code of conduct that the tribunal members must follow.<sup>159</sup> More substantial changes came in CETA, which has established bilateral Investment Court System. When compared to the traditional investor-state arbitration, the main changes contained in CETA are the introduction of an appellate mechanism,<sup>160</sup> as well as, lack of the principle of party autonomy in selection of arbitrators for individual disputes.<sup>161</sup> These amendments are a significant departure from the dispute resolution mechanism preferred by the Member States in their BITs and have sparked a considerable opposition in the Council during the conclusion of CETA.<sup>162</sup> The strength of the countervailing forces stemming from the Council has been so strong that currently the EU's first investment chapter is being held hostage by the Member States until the CJEU rules on the compatibility of the solution proposed by the Commission with EU law<sup>163</sup>. A positive opinion by the Court could strengthen the position of the Commission *vis-à-vis* the Member States, though there are signs in the Opinion 2/15 that the CJEU holds unfavourable views about investor-State arbitration. This issue has been evaluated in detail in Chapter 6.

The Commission, however, has been prepared for a potential rejection of the dispute resolution mechanism by the Court by implementing its reforms in two phases. Thus, whereas CETA introduces bilateral Investment Court System, the Commission's ultimate goal is to establish a Multilateral Investment Court and to that effect it has asked the Council to authorise opening of negotiations.<sup>164</sup> This bold proposal seeks to cultivate further the pressure for reform stemming from the voices of the civil society. Moreover,

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<sup>159</sup> EU-Singapore FTA, Art 9.18 and Annex 9-F

<sup>160</sup> CETA, Art 8.28; EU-Vietnam FTA, Art 13.

<sup>161</sup> CETA, Art 8.27; EU-Vietnam FTA, Art 12.

<sup>162</sup> Council, 'Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, on the Other Part – Statements of the Council Minutes' 13239/16 WTO 288 SERVICES 25 FDI 21 CDN 21.

<sup>163</sup> Court of Justice, 'Request for an Opinion Submitted by the Kingdom of Belgium Pursuant to Article 218(11) TFEU (Opinion 1/17)' OJ C369/2.

<sup>164</sup> Commission, 'Recommendation for a COUNCIL DECISION authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes' COM/2017/0493 final.

a successful establishment of a Multilateral Court would constitute a strong exogenous pressure for further integration in the sphere of the CCP, similar to that created by the WTO in relation to spheres of trade in services and commercial aspects of intellectual property rights. A support of the Commission's initiative from a wider international community would go a long way in legitimising its new position and could help in persuading Member States that the institution is best placed to represent them in the field of international investment. In this context, the launching of the UNCITRAL Working Group III on the Investor-State Dispute Settlement Reform may prove beneficial for the Commission's case.<sup>165</sup> Nonetheless, the establishment of a Multilateral Investment Court remains controversial and from a perspective of the neofunctionalist theory has to be viewed as a long-term and high risk strategy with respect to ensuring further integration in the CCP.<sup>166</sup>

### 3.5. Conclusions

Since the entry into force of the Treaty of Lisbon 2009, the Commission has pursued a wide-ranging strategy for developing and implementing the EU's new international investment strategy, which allowed it to cultivate spillover pressures for further integration. The EU institution has been driving initiatives both internally and externally, to strengthen its position in the field. To that end the Commission has presented a comprehensive reform package and has been trying to reduce the size and impact of Member States BIT networks. Moreover, the Commission has also made an effort to establish a multilateral system for investment protection in order to create an exogenous pressure that inspires further transfer of powers to the supranational centre.

Although the Commission's actions have received mixed reactions from the Member States, a level of support has started to develop towards its reform proposal of investment protection standards, especially among the states who faced a number of investor-state claim. Thus, the Commission's actions can be considered to move the development of the EU international investment policy gradually forward. It is, therefore, considered that the continued exercise of the FDI powers by the Commission will be incrementally

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<sup>165</sup> UNCITRAL, 'Report on the Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (27 November- 1 December 2017)' (2018).

<sup>166</sup> Philipp Kurek and Noah Stewart-Orstein, 'Update on the European Commission's Drive for Investment Courts' (*Practical Law Arbitration Blog* 2 November 2017) <<http://arbitrationblog.practicallaw.com/update-on-the-european-commissions-drive-for-investment-courts/>> accessed 08 January 2018.

increasing the integrative pressure within the CCP. In the light to the analysis contained in this chapter, the Commission emerges as an important source of pro-integrative forces in the process of integration in the CCP, which is consistent with its neofunctionalist depiction.

Notwithstanding the positive contribution made to date by the Commission's, its reform proposals are bold and significantly modify investment protection norms previously established by the Member States. Thus, in order to ensure successful implementation of the EU investment policy, the Commission must foster further support for its proposals. In this context, the European Parliament has emerged as an important ally for the Commission and another source of positive forces in the dialectical process of integration. The next chapter evaluates the contribution of the European Parliament to the development of the EU investment policy and furthering the supranationalisation of the CCP.

## **Chapter 4.**

# **The Contribution of the European Parliament to the Development of the Common Policy on International Investment and the Role of the Institution in the Process of Integration in the CCP**

### **4.1. Introduction**

Although for a long time the European Parliament had had virtually no powers in the area of the CCP, the Treaty of Lisbon 2009 has significantly enhanced its position, by not only granting to the institution a right to be consulted, but also allowing it to participate in the decision making process. Alongside the transfer of competences evaluated in Chapter 2, this development has been an important milestone in the evolution of the CCP and is at the centre of the analysis conducted in this chapter.

As outlined below, the gradual democratisation of different spheres of EU activity including the CCP, has been facilitated by the efforts of the European Parliament to increase its own powers. From the perspective of the neofunctionalist theory, the institution was able to effectively cultivate various functional pressures to further the supranationalisation of the CCP. Now, as an actor in this area, the Parliament has an opportunity to shape the EU external action and help in cultivating spillover pressures for future transfer of competences.

In the light of the main research question, this chapter evaluates from the perspective of the neofunctionalist theory of integration the role of the European Parliament in furthering the process of EU integration in the area of the CCP since the entry into force of the Treaty of Lisbon 2009.

### **4.2. The Parliament in the Neofunctionalist Framework**

The European Parliament has not featured prominently in the early neofunctionalist theory due to the fact that the Treaty provided the institution with only few powers; hence its ability to cultivate integrative pressures was limited<sup>1</sup>. The revised neofunctionalist framework, however, takes into account the evolving institutional structures of the Union

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<sup>1</sup>Arne Niemann, *Explaining Decisions in the European Union* (CUP 2006), 44.

and considers the role of the Parliament in the process of integration.<sup>2</sup> Therefore, the later neofunctionalist works recognise the long-term struggle of the European Parliament for a right to participate in the legislative process since the entry into force of the Treaty of Rome 1958<sup>3</sup>.

The Member States had resisted granting of any powers to the European Parliaments in the sphere of the CCP for a long time. Thus, for over fifty years, the institution had had to adopt the neofunctionalist tactics to modify the EU constitutional practice and cultivate pressures for the Treaty reform through interinstitutional agreements and litigation. These strategies eventually proved effective and resulted in the granting to the European Parliament the decision making competences with respect to the CCP in the Treaty of Lisbon 2009.<sup>4</sup> In this context, the evolution of the provisions governing the decision making in the CCP, which has been gradual and incremental, resembles the expansion of the Union's competences in this area, as evaluated in Chapter 2.

In the last Treaty negotiations, the Parliament has emerged as a strong pro-integrative force arguing not only for an institutional change, but also backing the Commission's efforts to secure expansion of the Union's competences in the area of the CCP.<sup>5</sup> Since the extension of the sphere of the Union's activity also increases the zone of influence of the European Parliament, its behaviour is consistent with the neofunctionalist depiction of the EU institutions as self-interested actors. The continued support of the Parliament for the Commission's strategy in relation to the CCP and the international investment is essential in legitimising the latter's reform proposals, outlined in Chapter 3, and increases the pressure for further transfer of loyalties to the supranational centre.<sup>6</sup> Thus, as is apparent from the analysis conducted below, the Parliament has emerged, alongside the Commission, as another source of positive forces in the dialectical process of integration in the CCP.

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<sup>2</sup> Ibid.

<sup>3</sup> Ibid; Arne Niemann, 'Conceptualising Common Commercial Policy Treaty Revision: Explaining Stagnancy and Dynamics from Amsterdam IGC to the Treaty of Lisbon' (2011) 15 *European Integration Online Papers*, 34-35. <<http://eiop.or.at/eiop/>> accessed 5 January 2017.

<sup>4</sup> New formal powers of the European Parliament in the CCP include the right to participate in the legislative process for the implementation of the CCP, the right to be regularly informed about the conduct of international negotiations, and consent powers over the conclusion of EU international agreements. Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 (TFEU), Art 207, 218.

<sup>5</sup> Niemann (n 1) 178-180.

<sup>6</sup> The role of the Parliament in legitimising the actions of the EU has been recognised as crucial for the process of integration in the revised neo functionalist framework. Niemann (n 1) 4.

Nonetheless, since the CCP has been historically dominated by the EU executive, the Parliament starts in a weaker position in comparison to the Commission and the Council. As identified in this chapter, the Parliament's powers in the EU external action could be increased to improve the effectiveness of its involvement. Thus, the impact of the Parliament on the shape and direction of the EU's investment policy depends upon its ability to establish itself among more experienced institutional actors and foster pressures for further transfer of competences. However, the new balance of powers weakens the position of the Council and intensifies the strength of countervailing forces in the process of integration, which is the main obstacle in the Parliament's way. Furthermore, the use of the mixed procedure for the conclusion of international investment treaties due to the non-exclusive nature of the EU powers creates a tension between the national parliaments and European Parliament and weakens the latter's position as a source of democratic legitimacy in the CCP.<sup>7</sup>

In the light of this background the analysis in this chapter is divided into two parts. Firstly, the neofunctionalist evolution that occurred in relation to the decision making process in the CCP is evaluated. Secondly, the Parliament's contribution to the development of the EU international investment policy and its ability to cultivate further integrative pressures are assessed.

### **4.3. The Emergence of the European Parliament as an Actor in the CCP-Functional Pressures**

In accordance with the neofunctionalist theory of integration, the functional pressures can arise out of endogenous contradictions. Niemann considers them as structural components in the analytical framework, which convince actors to take further integrative steps in order to achieve their different objectives.<sup>8</sup> In the context of the CCP, it was the multiplicity of aims pursued by the Treaty drafters, which created a need for a comprehensive reform in this policy area. Upon the conclusion of the Treaty of Nice in 2001, the Member States called for a deeper and wider debate about the future of the European Union, which was to address, *inter alia*, issues of democratic legitimacy of the Union.<sup>9</sup> Furthermore, in Laeken, where in the spirit of the Nice Declaration the direction

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<sup>7</sup> Opinion 2/15 *Free Trade Agreement between the European Union and the Republic of Singapore* [2017] OJ C239/3 (Opinion 2/15).

<sup>8</sup> Niemann (n 3)

<sup>9</sup> Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts [2001] OJ C80/01, 85-86.

for the next Treaty reform was set, the Member States called not only for more democracy, but also more efficiency.<sup>10</sup> As a consequence, the scope of the CCP was expanded in the Treaty of Lisbon 2009.<sup>11</sup> However, in the light of the commitment to improve the democratic accountability of the EU, the move towards greater exclusivity in the area of the CCP had to be complimented with a reform of the decision-making process.

Prior to the entry into force of the Treaty of Lisbon 2009, it has been commonly acknowledged that the level of democratic legitimacy of the EU's CCP was relatively low.<sup>12</sup> In the past, the Member States prioritised efficiency in concluding international trade agreements over the accountability of the process. Thus, since the Treaty of Rome 1958 until the Treaty of Lisbon 2009, this area of EU competence was characterised by executive dominance, with the Council and the Commission holding all formal powers in relation to the negotiations and conclusions of international trade agreements.<sup>13</sup> At that time, the Treaty did not give the European Parliament even a mere right to be consulted on matters relating to the conclusion of trade agreements. Krajewski suggested that such an institutional design reflected the classic doctrine of necessity of unlimited and unchecked foreign affair powers, which was based on, as he put it, "an archaic assumption that external trade policy is best conducted without any parliamentary input or interferences."<sup>14</sup> Nonetheless, the democratic deficit in this area, at least in theory, was alleviated by the fact that as the spheres of the EU's exclusive competence were limited just to trade in goods, the vast majority of the international commercial agreements were concluded using the mixed procedure, which required the involvement of all national parliaments.<sup>15</sup>

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<sup>10</sup> Council, 'Presidency Conclusions: European Council Meeting in Laeken 14 and 15 December 2001, Annex 1: Laeken Declaration on the Future of the European Union' SN 300/1/01 REV 1, 23.

<sup>11</sup> Marise Cremona, 'The Draft Constitutional Treaty: External Relations and External Action' (2003) 40 *Common Market Law Review* 1347, 1365; Angelos Dimopoulos, 'The Common Commercial Policy after Lisbon: Establishing Parallelism Between Internal and External Economic Relations?' (2008) 4 *CYELP* 102, 129.

<sup>12</sup> Markus Krajewski, 'External Trade Law and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy?' (2005) 42 *Common Market Law Review* 91; Cremona (n 11), Stephen Woolcock, 'The Treaty of Lisbon and the European Union as an Actor in International Trade' ECIPE Working Paper No. 01/2010, 7.

<sup>13</sup> Consolidated Versions of the Treaty on European Union and of the Treaty Establishing European Community (Treaty of Nice) [2002] OJ C325/1, Art 133.

<sup>14</sup> Krajewski (n 12) 98.

<sup>15</sup> Woolcock (n 12).



The expansion of the scope of the CCP to areas, such as: trade in services, commercial aspects of intellectual property rights and foreign direct investment in the Treaty of Lisbon 2009 was expected to dispense with the need to involve national parliaments in the ratification of trade agreements.<sup>16</sup> However, the move towards complete exclusivity in the CCP created an accountability gap, which gave rise to the functional pressure for further Treaty reform. In this situation, the obvious choice of a solution was to grant the European Parliament power to scrutinise the trade and investment treaty-making practice of the Commission.<sup>17</sup> Thus, with the entry into force of the Treaty of Lisbon 2009 the position of the European Parliament in the CCP has been significantly enhanced. Article 207 TFEU now requires that the European Parliament is informed on the progress of negotiations conducted by the Commission.<sup>18</sup> Furthermore, from an institution that did not possess any formal powers to influence the direction of the EU's trade policy,<sup>19</sup> the European Parliament became, alongside the Council, a co-legislator in the field,<sup>20</sup> and its consent is required for the conclusion of any international trade agreements.<sup>21</sup>

Broadly defined objectives for the future of the EU in the Laeken declaration have not been the only functional pressure, which resulted in the enhanced role of the European Parliament in the CCP. The general objectives of the EU trade policy can also be regarded as a force behind this reform.<sup>22</sup> For the past two decades the Union has tried to use its trade agreements not only to develop new commercial relations with other states, but also to promote human rights, rule of law and democracy.<sup>23</sup> In the neofunctionalist framework, these ancillary aims can be considered as another endogenous factor that facilitated

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<sup>16</sup> Ibid; Anne Pollet-Fort, 'Implication of the Lisbon Treaty on EU External Trade Policy' (2010) Background Brief No 2, EU Centre in Singapore, 15.

<sup>17</sup> Niemann (n 1) 25; Ricardo Passos, 'Mixed Agreements from the Perspective of the European Parliament' in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: the EU and Its Member States in the World* (Hart Publishing 2010), 270.

<sup>18</sup> TFEU, Art. 207(3).

<sup>19</sup> Panos Koutrakos, 'EU International Relations Law' (Hart 2015), 133.

<sup>20</sup> TFEU, Art. 207(2).

<sup>21</sup> Ibid Art. 218(6)(a)(v).

<sup>22</sup> Alasdair R. Young and John Peterson, 'The EU and the New Trade Politics' (2006) 13 *Journal of Public Policy* 795.

<sup>23</sup> Ibid; Matthew Baldwin, 'EU Trade Politics – Heaven or Hell?' 13 *Journal of European Public Policy* 926, 936; Sophie Meunier and Kalypso Nicolaïdis, 'The European Union as a Conflicted Trade Power' (2006) 13 *Journal of European Public Policy* 906, 907; Fabian Amtenbrink and Dimitry Kochenov, 'Conclusions: Mechanism, Mission, or *Realpolitik*? Some Concluding Observations on the EU's Role in Shaping the International Legal Order' in Dimitry Kochenov, Fabian Amtenbrink (eds) *The European Union's Shaping of the International Legal Order* (CUP 2014), 349.

supranationalisation of the CCP and was a positive force that contributed to the extension of the powers of the European Parliament

Promotion of human rights and other values through trade agreements has become a part of the EU's international identity already prior to the entry into force of the Treaty of Lisbon 2009.<sup>24</sup> The latest Treaty revision further enhances the role of the EU as a normative power in external relations, by comprehensively defining the principles that should be promoted in all of its external action.<sup>25</sup> Therefore, as described by Krajewski, two layers of objectives apply to it.<sup>26</sup> The most immediate one, the inner layer, includes aims specific to international trade, such as: contribution to the harmonious development of world trade and progressive liberalisation of trade and investment.<sup>27</sup> In the outer layer, there are general objectives that the EU seeks to consistently pursue through all of its foreign policy, which are "to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms...".<sup>28</sup> These goals are to be pursued with equal importance by all EU external policies and their obligatory nature with regards to the CCP is confirmed in Article 205 TFEU.

As the EU enjoys considerable market power in international trade derived from the size of its economy, the deepening of the international trade agenda has been to large extent influenced by the EU's foreign policy.<sup>29</sup> The new generation of the EU's comprehensive economic agreements require a degree of regulatory convergence, which means that international treaties signed by the EU increasingly affect national legislative frameworks. This intrusion of matters of international trade into the domestic policies has given national parliaments and NGOs a stake in international trade negotiations.<sup>30</sup> The European Parliament has attached great importance to "non-traditional trade-related issues" and historically its actions have been focused on the promotion of social rights

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<sup>24</sup> Young and Peterson (n 22) 803; Marise Cremona, 'Values in EU Foreign Relations' in Malcolm Evans and Panos Koutrakos *Beyond the Established Legal Orders: Policy Interconnections between the EU and the Rest of the World* (Hart Publishing 2011); Angelos Dimopoulos, 'The Effects of the Lisbon Treaty on the Principles and Objectives of the CCP' *European* (2010) 15 *Foreign Affairs Review* 153, 157; Baldwin (n 23).

<sup>25</sup> Consolidated Version of the Treaty on the European Union (TEU) [2016] OJ C 202/13, Title V, Chapter 1.

<sup>26</sup> Markus Krajewski, 'The Reform of the Common Commercial Policy' in Anrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU Law After Lisbon* (OUP 2012), 294.

<sup>27</sup> TFEU, Art 206.

<sup>28</sup> *Ibid* Art 21.

<sup>29</sup> Young and Peterson (n 22) 803.

<sup>30</sup> *Ibid*, 795; Woolcock (n 12) 7.

and environmentally friendly approaches.<sup>31</sup> A lack of formal role of the European Parliament in the EU's trade policy, which increasingly has been affecting welfare of the EU citizens, was considered to undermine its legitimacy.<sup>32</sup> Consequently, broad aims of the EU external action, which in the past two decades set the trends in international trade, have further strengthened claims of the European Parliament to greater influence over trade and investment agreements.

#### **4.4. The European Parliament's Influence over the Reform of the Decision Making Process in the CCP**

Functional pressures, which arise out of various contradictors between the Treaty provisions and conflicting objectives have to be cultivated by the supranational actors in order to persuade the Treaty drafters to take further integrative steps.<sup>33</sup> In this context, the neofunctionalist theory of integration posits that the interdependencies between different economic sectors, areas of EU law, etc. are exploited by supranational institutions to pursue their own interest, which puts them at the heart of the process of integration.<sup>34</sup> It is one of the core tenets of the neofunctionalism that the EU institutions favour pro-integrative solutions, because a closer Union between the Member States results in a greater transfer of powers to the supranational centre that they occupy.<sup>35</sup>

The European Parliament fits well into this theoretical description, as in the past four decades, it used various opportunities to increase its influence.<sup>36</sup> Although in a gradual manner, the institution has done so with a considerable success enhancing its position in virtually all areas of EU competence.<sup>37</sup> The Parliament had played an important role in increasing the supranational character of the CCP in the latest treaty revision. During the Convention, the Parliament was considered to be the most organised fraction, which allowed it to assert greater influence than at any previous IGCs<sup>38</sup> and effectively seize

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<sup>31</sup> Marika Armanoviča and Roberto Bendini, 'In-Depth Analysis: The Role of the EP in Shaping the EU's Trade Policy after the Entry into Force of the Treaty of Lisbon' (Director-General for External Policies, Policy Department, 2014), 12.

<sup>32</sup> Baldwin (n 23) 929.

<sup>33</sup> Niemann (n 1) 11.

<sup>34</sup> Arne Niemann (n 1) 5.

<sup>35</sup> Niemann (n 1) 46.

<sup>36</sup> Francis Jacobs, Richard Corbett and Michael Shackleton, *European Parliament* (8<sup>th</sup> edn, John Harper Publishing 2011), 3, 251-252.

<sup>37</sup> Jacobs, Corbett and Shackleton highlight that there are just over 30 instances (half of which are legislative in nature) where the Parliament has a right only to be consulted and does not participate in the decision-making process. Francis Jacobs Richard Corbett and Michael Shackleton (n 36) 258.

<sup>38</sup> Niemann (n 3) 35.

opportunities created out of various functional pressures described in the section above to bring about a change in the EU's trade policy.<sup>39</sup>

However, the ability of the Parliament to assert a strong position during the last treaty negotiations has not been the only factor, which allowed the institution to increase its powers. Although the Treaty of Lisbon 2009 is an important breakthrough in the democratisation of the CCP, the reform has been a result of a long-term strategy pursued by the European Parliament, which is consistent with the neofunctionalist understanding of integration, as a gradual and incremental process.<sup>40</sup> Already in the initial formulation of the theory, Haas himself noted how the federal tendencies had dominated in, what was then called, the Common Assembly, and how the institution was trying to enhance its position vis-à-vis the High Authority (now the Commission) and the Council.<sup>41</sup> The first demands for an increase in the scope of its competences had started, as early as in 1955, when the Common Assembly attempted to obtain the right to be consulted on the choice of the High Authority's President.<sup>42</sup> Despite the fact that the proposal lacked the support of the Council, it had prompted the Common Assembly to launch a long-term programme designed to prove necessity for democratic control in different spheres of supranational governance.<sup>43</sup>

This was not an easy process in the context of the CCP, which for a long time remained a highly technical and bureaucratic in nature. The general opinion, which prevailed for a long time was that the involvement of the European Parliament would politicise the EU's trade policy making.<sup>44</sup> The main fear was that the greater involvement from the EU representative body would make the EU more protectionist in negotiations, slowing down what was already a complex and lengthy process of concluding international trade agreements on behalf of a block of 28 Member States.<sup>45</sup> Furthermore, the view of 'institutional-isolation' historically prevailed in the Council, according to which the population at large would benefit from less political interference in the trade policy-making process.<sup>46</sup> The Council preferred to keep matters concerning the EU's

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<sup>39</sup> Ibid.

<sup>40</sup> Ernst B. Haas, *The Uniting of Europe: Political, Social, and Economic Forces 1950-1957*, (Stanford University Press, 1958), XX.

<sup>41</sup> Ibid 109.

<sup>42</sup> Ibid 107.

<sup>43</sup> Ibid, 108.

<sup>44</sup> Anne Pollet-Fort (n 16); Niemann (n 3).

<sup>45</sup> Piet Eeckhout, *EU External Relations Law* (2<sup>nd</sup> ed, OUP 2011), 210; Ricardo Passos (n 17).

<sup>46</sup> Ibid.

international trade strategy confidential, not to prejudice the EU's negotiating position vis-à-vis the third states.<sup>47</sup> The opening of the CCP to the scrutiny by the European Parliament was viewed as a threat to EU's power on the international scene.<sup>48</sup> Thus, the Member States did not support the involvement of the European Parliament in the decision-making process concerning the EU's trade policy.<sup>49</sup>

Notwithstanding this initial lack of will for incorporating some parliamentary controls into the CCP, the European Parliament had not just waited patiently for general attitudes to shift, but actively implemented its strategy for greater democratisation of the EU's governance. It had done so, for example, through entering into intra-institutional agreements with both the Council and the Commission. The first informal expansion of powers occurred in 1964, when the Council promised to inform the European Parliament on negotiations of association agreements.<sup>50</sup> In 1973 the procedure was extended to cover commercial and economic treaties by the *Luns II-Westerterp* procedure.<sup>51</sup> Finally, in the 1983 Stuttgart 'Solemn Declaration on the European Union' the Council agreed to consult with the European Parliament prior to the conclusion of all 'significant' international agreements.<sup>52</sup> Additionally, the Parliament concluded a series of agreements with the Commission which ensured its right to be consulted on various legislative proposals and negotiations of international agreements in different spheres of EU competence.<sup>53</sup> The ad-hoc arrangements between the two institutions<sup>54</sup> have been

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<sup>47</sup> Eeckhout (n 45) 458, 459, 460.

<sup>48</sup> Eeckhout (n 45) 210.

<sup>49</sup> Stephen Woolcock (n 12) 7.

<sup>50</sup> The first arrangement between the Council and the European Parliament was *Luns I* procedure. Ian MacLeod, Ian Hendry, Stephen Hyett, *The External Relations of the European Communities: A Manual of Law and Practice*, (Clarendon Press, Oxford, 1996) 98-100.

<sup>51</sup> Jacobs, Corbett and Shackleton (n 36) 252; Passos (n 17) 274.

<sup>52</sup> Ibid, European Council, 'Solemn Declaration on European Union, Stuttgart' (1983) Bull. EC 6-1983, 24, 26-27.

<sup>53</sup> The first agreement of this type between the Commission and the European Parliament was the 1995 Code of Conduct. Macleod, Hendry, Hyett (n 50) 98-100.

<sup>54</sup> The first 'Code of Conduct' between the Commission and the European Parliament was negotiated in 1990 and revised in 1995. Jacobs, Corbett and Shackleton (n 36) 313-314.

codified in 2000<sup>55</sup> Framework Agreement, which was subsequently revised in 2005<sup>56</sup> and 2010.<sup>57</sup>

These intra-institutional agreements have led to a gradual Treaty change and the formal expansion of the European Parliament's powers in the Single European Act 1987 and later in the Treaties of Maastricht, Amsterdam, Nice and finally Lisbon, which brought the CCP within the sphere of influence of the European Parliament.<sup>58</sup> Furthermore, the strategy of informal democratisation of the EU decision making was effective in shifting attitudes of the Commission towards the role of the European Parliament. In the early phases of the Union, the mutual support and close cooperation were lacking between these two intuitions, with the former refusing even to present the budget to the Common Assembly.<sup>59</sup> Nonetheless, with time and in the light of the considerable effort by the European Parliament to enhance its position the Commission has recognised it as a source of democratic legitimacy and an ally in the process of European integration.<sup>60</sup>

Although the Commission has eventually come on board to support the institutional agenda of the European Parliament, the Council, despite its prior history of enabling parliamentary involvement, has unexpectedly adopted the opposite position.<sup>61</sup> The Council voiced out its concerns for the first time in 2005, soon after the entry into force of the Framework Agreement between the Commission and the European Parliament.<sup>62</sup> In its opinion, the intra-institutional arrangement granted too many concessions and upset the institutional balance.<sup>63</sup> In the official statement the Council reserved the right to take

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<sup>55</sup> European Parliament, 'Framework Agreement on relations between the European Parliament and the Commission' (2001) C5-0349/2000 OJ C 121/122, Annex 2 para 2.

<sup>56</sup> European Parliament and European Commission, 'Framework Agreement on EP-Commission Relations. European Parliament Decision on the Revision of the Framework Agreement on Relations between the European Parliament and the Commission' (2005/2076 (ACI)) P6\_TA(2005)0194 (2005 Framework Agreement), para 19.

<sup>57</sup> European Parliament and European Commission, 'Framework Agreement on Relations between the European Parliament and the European Commission' (2010) OJ L 304/47 (2010 Framework Agreement).

<sup>58</sup> TFEU, Art 207; Jacobs, Corbett and Shackleton (n 36) 250, 252; Stefan Riesenfeld (ed), *Parliamentary Participation in the Making and Operation of Treaties: A Comparative Study* (Den Haag, Kluwer, 1994); Daniel Thym, 'Parliamentary Involvement in European International Relations' in Cremona and de Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Hart Publishing 2008), 6.

<sup>59</sup> Erns Haas (n 40) 478-479.

<sup>60</sup> An improvement in the relationship between the Commission and the Parliament was visible in the recent Opinion 2/15, where institutions together supported arguments for the exclusive nature of the EU competences. Opinion 2/15 (n 7).

<sup>61</sup> Jacobs, Corbett and Shackleton (n 36) 250.

<sup>62</sup> 2005 Framework Agreement.

<sup>63</sup> Council (EC), 'Council Statement Concerning the Framework Agreement on Relations between the European Parliament and the Commission' (2005) OJ C 161/1.

legal actions against any of the two institutions.<sup>64</sup> In the light of the previous approval granted by the Council to include Member of the European Parliament (MEPs) in the negotiating delegations of the EU, the objection came unannounced.<sup>65</sup> However, if viewed in the context of the 2010 Framework Agreement, which has further extended the right of the Parliament to participate in the international negotiations of the EU,<sup>66</sup> it becomes apparent that the Council has feared and was trying to prevent the continuous, informal expansion of the powers of the European Parliament through agreements with the Commission. Such arrangements, over which the Council has had no control, diminish its influence in the EU external relations and undermine the position of the Member States in international negotiations.<sup>67</sup>

#### **4.5. The European Parliament's Position in the CCP**

As evaluated above, the European Parliament has long adopted the neofunctionalist tactics to expand its competences and its actions have contributed to the process of supranationalisation of the CCP.<sup>68</sup> From the neofunctionalist perspective, the institution was capable of effectively cultivating pressures existing within functional structures for increasing its own zone of influence. However, despite the significant expansion of the European Parliament's powers, its bargaining power in the CCP is weaker than that of the EU executive, which controls the course of the common international investment policy. The improvement of the Parliament's position in the CCP depends largely upon its continued effort to foster the integrative pressures for future transfer of investment

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<sup>64</sup> Ibid.

<sup>65</sup> In 1998 the Council agreed for the MEPs to join the EU delegations at international conferences, subject to a request being submitted at least four weeks in advance by the President of the Parliament. The MEPs were, however, excluded from direct negotiating sessions and the EU Coordination meetings. The 2004 Framework Agreements did not extend rights of the European Parliament beyond these arrangements, it provided that: "Where the Commission represents the European Community, it shall, at Parliament's request, facilitate the inclusion of Members of Parliament as observers in Community delegations negotiating multilateral agreements. Members of Parliament may not take part directly in the negotiating sessions". Framework Agreement 2005, para 21; Jacobs, Corbett and Shackleton (n 36) 255.

<sup>66</sup> The 2010 Framework Agreement formally opened up a possibility for the MEP to be included in negotiating sessions. It also requires that the Commission to facilitate access of the MEPs as observers to meetings and bodies, whenever decision is taken that requires Parliamentary consent or the implementation of which may require the adoption of legal acts in accordance with the ordinary legislative procedure. Moreover, unlike the previous arrangements, the agreement imposes duties upon the Commission to facilitate the parliamentary involvement. Framework Agreement 2010, para 25-27.

<sup>67</sup> Council (EU), 'Council Statement on Framework Agreement on Relations between the European Parliament and Commission' (Press Release) October 2010; Daniel Thym (n 58) 6.

<sup>68</sup> Further on this point: Jean-Claude Piris, 'Where Will the Lisbon Treaty Lead Us?' in Anthony Arnall, Catherine Barnard, Michael Dougan, Eleanor Spaventa (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing 2011), 61; Andrea Ott, 'The European Parliament's Role in EU Treaty-making' (2016) 23 Maastricht Journal of European and Comparative Law 1009, 1019.

powers to the supranational centre and further democratisation of the procedure for conclusion of the EU international treaties.

#### **4.5.1. The Opportunities for Enhancement of the Position of the European Parliament**

One of the weaknesses in the Parliament's position is the lack of powers to input into the negotiating directives or the decision to open negotiations, which remain completely within the Council's control.<sup>69</sup> Arguably allowing the European Parliament to participate in the decision making process in relation to these two stages in negotiations of the international agreements falling within the scope of the CCP would achieve full parallelism between the institution's internal and external powers. A lack of such competences puts the Parliament at a disadvantage *vis-à-vis* the other institution with respect to the ability to influence the direction, reach and content of the EU investment policy.

The Parliament, however, enjoys the right to be 'immediately and fully informed' at all stages of negotiations of the international agreements by both the Council and the Commission.<sup>70</sup> As highlighted by the CJEU in two recent disputes between the European Parliament and the Council, this duty allows the former to exercise the democratic control, ensure consistency and coherence in EU external action and verify whether its powers are respected through the choice of a legal basis.<sup>71</sup> The Court has further pointed out that the right of the Parliament to be informed was the expression of the democratic principles on which the Union is founded<sup>72</sup> and observed by Advocate General Kokott it existed long before its codification in Article 218(10) TFEU.<sup>73</sup> Thym, however, observed that compliance with this duty by the Council was weak prior to the entry into force of the Treaty of Lisbon 2009.<sup>74</sup> In the light of the abovementioned case law, this culture is likely to change, since the CJEU held that noncompliance with the duty to regularly

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<sup>69</sup> TFEU, Art 207(3), 218(2).

<sup>70</sup> TFEU, Art 218(10).

<sup>71</sup> Case C-263/14 *European Parliament v Council (Tanzania)* [2016] OJ C305/04, paras 71-72; Case C-658/11 *European Parliament v Council (Somali Pirates)* [2014] OJ C058/08, para 77.

<sup>72</sup> *Somali Pirates* (n 71) para 81.

<sup>73</sup> Case C-263/14 *European Parliament v Council (Tanzania)* [2015] OJ C305/04, Opinion of AG Kokott, para 80.

<sup>74</sup> Daniel Thym, 'Beyond Parliament's Reach? The Role of the EP in the CFSP?' (2006) 11 EFA Rev 109, 114.



provide information to the Parliament constitutes a breach of an essential procedural requirement and as a consequence may result in the annulment of a contested act.<sup>75</sup>

Thus, in relation to the initial stages of negotiations, the Lisbon amendments have moderately strengthened the position of the European Parliament, by allowing it to be more involved in the interinstitutional dialogue. In the area of investment, the institution appears to be making the most of its new formal powers. To that end, the parliamentary Committee on International Trade (INTA) follows negotiations of investment treaties even before they are officially launched. Prior to the adoption of the mandate by the Council and during the negotiations, the INTA Committee Monitoring Group undertakes regular discussions and conducts oral questioning of the EU chief negotiators. The Parliament also passes resolutions, which outline its priorities.<sup>76</sup> Although the Commission and the Council are not obliged to follow these recommendations, such a decision may result in the Parliament's refusal to grant a consent to an EU international agreement, as seen in relation the SWIFT and ACTA Agreements evaluated below.<sup>77</sup>

The duty of the Commission to keep the Parliament regularly informed also extends to the conduct of negotiations concerning agreements falling within the CCP.<sup>78</sup> In this context, the Parliament recognises that the closer it is allowed to monitor how the talks progress, the more power it has to establish conditions for granting the consent and greater is its capacity to shape the EU's external policies.<sup>79</sup> Thus, the Parliament has been trying to assert its position in the CCP, by using its consent powers in a constructive manner.

The first situation, which demonstrated that the role of the European Parliament in the EU's international trade relations should not be underestimated was the rejection of ACTA.<sup>80</sup> The Parliament's refusal to give consent to the conclusion of the agreement was a response to the general public concern over the impact that its entry into force may have

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<sup>75</sup> *Tanzania* (n 71) para 81; *Somali Pirates* (n 71) para 80.

<sup>76</sup> Details of the current constitutional practice of the European Parliament with regards to the EU investment agreements were provided by the Secretariat of the Committee on International Trade – INTA.

<sup>77</sup> An Example, where the Commission rejected the recommendation of the European Parliament is: Commission, 'Follow up to the European Parliament Resolution of the future European International Investment Policy' 5 July 2011.

<sup>78</sup> TFEU, Art 207(3).

<sup>79</sup> Armanoviča and Bendini (n 31) 6.

<sup>80</sup> European Parliament, 'Anti-Counterfeiting Trade Agreement between the EU and its Member States, Australia, Canada, Japan, the Republic of Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland and the USA (Consent)' (2012) P7\_TA(2012)0287.

on the right to privacy and civil liberties.<sup>81</sup> Secondly, the Parliament rejected 2010 SWIFT Agreement, because the EU executive failed to provide information on the progress of these negotiations and did not take into account its concerns expressed in a Resolution.<sup>82</sup> Although the European Parliament has been described as cautious when exercising its new powers,<sup>83</sup> its rejection of agreements such as SWIFT and ACTA sent a clear message about its readiness to veto any international deal that does not sufficiently incorporate parliamentary views, or is strongly contested by the EU citizens.<sup>84</sup> Moreover, these events have allowed the European Parliament to establish a new precedent in the constitutional practice for conclusion of international treaties in a post-Lisbon era, which requires the Council and the Commission to listen to its voice, when setting the negotiating directives and throughout the conduct of negotiations.<sup>85</sup>

Furthermore, the interinstitutional agreement concluded between the Commission and the Parliament allows a delegation of MEPs to participate in negotiations between the EU and a third country.<sup>86</sup> Thus, despite a considerable increase of the European Parliament's powers, the interinstitutional agreements continue to be important to its position in the post-Lisbon era. However, as soft law they provide the Parliament with weak guarantees, because their provisions preserve their binding nature only for, as long as, the institutions concerned are willing to uphold them.<sup>87</sup> These informal arrangements are not, as Eeckhout put it a "...substitute for constitutional guarantees of involvement" and the current arrangements leave it to the Commission's discretion to decide whether the MEPs should be included in the EU delegation as observers.<sup>88</sup> With regards to this, the Council's

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<sup>81</sup> Jörg Monar, 'Editorial Comment. The Rejection of the EU-SWIFT Interim Agreement by the European Parliament: A Historic Vote and Its Implications' (2010) 15 *European Foreign Affairs Review* 143; Juan Santos Vara, 'The Role of the European Parliament in the Conclusion of the Transatlantic Agreements on the Transfer of Personal Data after Lisbon', *CLEER Working Papers* 2013/12.

<sup>82</sup> Monar (n 21); European Parliament, 'SWIFT: European Parliament votes down agreement with the US (Press Release)' (2010) <<http://www.europarl.europa.eu/sides/getDoc.do?type=IM-PRESS&reference=20100209IPR68674&language=EN>> accessed 28 January 2018.

<sup>83</sup> Ott reported that in the period of seven years since the entry into force of the Treaty of Lisbon 2009, the Parliament withheld its consent to three agreements, which are: ACTA, SWIFT (2010) and the 2011 continuation of the EU-Morocco Fisheries Protocol 2011, out of 250 agreements concluded by the EU in that period. Ott (n 68) 1019.

<sup>84</sup> Monar (n 81) 147; Santos Vara (n 81) 26-27.

<sup>85</sup> Monar (n 81) 147.

<sup>86</sup> Framework Agreement 2010, para 25.

<sup>87</sup> Jörg Monar, 'Interinstitutional Agreements: The Phenomenon and its new dynamics after Maastricht' (1994) *CML Rev* 31.

<sup>88</sup> The 2010 Framework Agreement between the Commission and the European Parliament provides that: "Members of the European Parliament may not participate directly in these negotiations. Subject to the legal, technical and diplomatic possibilities, they may be granted observer status by the Commission. In the event of refusal, the Commission will inform Parliament of the reasons therefor." Framework Agreement 2010, para 25.

resistance towards the parliamentary involvement, evaluated in greater detail in Chapter 5, could negatively impact on the Commission's decision to involve the MEPs in investment negotiations. Furthermore, the right to observe negotiations with third countries does not seem to improve the position of the European Parliament with respect to investment negotiations, which technical nature precludes effective engagement of the MEPs and for that reason the institution has not attempted to make use of this provision of the interinstitutional agreement yet.<sup>89</sup>

Although currently the Parliament is not involved in the bilateral investment negotiations conducted by the Commission, the existence of such a right could be considered within the neofunctionalist framework as a structural component that can be exploited by the institution to try to further expand its powers.<sup>90</sup> However, in the light of the dialectical nature of the process of integration, the success of such an endeavour will depend upon the strength of the countervailing forces stemming, in this case, mainly from the Council. Furthermore, in the light of the technical nature of investment negotiations it can be questioned, whether the Parliament should pursue the expansion of its competences in this area. In the light of the institution's functions, it could be argued that the Parliament is capable of making a more meaningful contribution at the beginning of the process, when a decision authorising opening of negotiations determines the direction of the EU external action and negotiating directives set the general objectives of the EU's policies.

Another disadvantage in Parliament's position in the CCP can be found in the procedure for provisional application of the EU international treaties, which at the moment does not provide for parliamentary involvement.<sup>91</sup> Although currently there is no consensus in the Council for provisional application of the EU investment chapters,<sup>92</sup> in the light of the non-exclusive nature of the EU competences,<sup>93</sup> use of the procedure could become more common in the future.<sup>94</sup> Notwithstanding the lack of formal powers, the Parliament was

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<sup>89</sup> Details provided by the Secretariat of the Committee on International Trade – INTA.

<sup>90</sup> It has been noted in the literature that post-Lisbon the Parliament has continued with its efforts to expand its role in conclusion of international agreements. See: Anne Pieter van der Mei, 'Case Note: EU External Relation and Inter-institutional conflicts. The Battlefield of Article 218 TFEU' 92016) 23 MJ 1051, 1053.

<sup>91</sup> TFEU, Art 218(5).

<sup>92</sup> Council, 'Council Decision on the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part' 10974/16 WTO 196 Services 21 FDI 17 CDN 13' WTO 194 Services 19 FDI 15 CDN 11 (Decision on Provisional Application of CETA).

<sup>93</sup> Opinion 2/15 (n 7).

<sup>94</sup> David Kleimann and Gesa Kübec, 'The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU: The Case of CETA and Opinion 2/15' (2016) EUI Working Paper No 2016/58 <<http://cadmus.eui.eu/handle/1814/43948>> accessed 07 January 2018.

able to influence an informal change in the constitutional practice, which requires the Commission to ask for parliamentary approval of international agreements prior to their provisional application, despite the lack of a requirement in the Treaty to do so.<sup>95</sup> Since the involvement of the European Parliament does not seem to affect the effectiveness of the procedure, based on the recent approval of CETA,<sup>96</sup> formal recognition of its role in the process could further improve the democratic legitimacy of the Union and would strengthen the position of the Parliament in the procedure for conclusion of international treaties, including Union's future investment agreements.

#### **4.5.2. Impact of the Mixed Procedure on the Position of the European Parliament**

The main weakness in the Parliament's position stems, however, from the division of competences between the Union and the Member States in the area of investment. As evaluated in Chapter 2, the CJEU confirmed in the Opinion 2/15 that the EU does not possess exclusive powers in the sphere of investment, hence conclusion of any agreements in this area will require involvement of all Member States.<sup>97</sup> This ruling significantly undermines the Parliament's position in the CCP, because it has to share the function of providing democratic legitimacy to the EU international investment policy with all national and regional parliaments. In this context, Majone proposed that the interests of European citizens find a more natural expression in their national parliaments, which speaks in favour of their involvement in the EU foreign relations.<sup>98</sup> Kuijper, on the other hand, opined that the participation of national representative bodies in conclusion of the EU investment agreements is an attack on the constitutional order of the Union and undermines the autonomy of the Union *vis-à-vis* the Member States.<sup>99</sup>

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<sup>95</sup> European Parliament, 'European Parliament Resolution of 16 February 2017 on Improving the Functioning of the European Union Building on the Potential of the Lisbon Treaty (2014/2249(INI))' P8\_TA(2017)0049, para 47.

<sup>96</sup> European Parliament, 'Legislative Resolution of 15 February 2017 on the Draft Council Decision on the Conclusion of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (10975/2016 – C8-0438/2016 – 2016/0205(NLE)) (Consent)' P8\_TA(2017)0030.

<sup>97</sup> Opinion 2/15 (n 7).

<sup>98</sup> Giandomenico Majone, *Dilemmas of European Integration: The Ambiguities & Pitfalls of Integration by Stealth* (OUP 2005), 25.

<sup>99</sup> Pieter-Jan Kuijper, 'Post-CETA: How We Got There and How to Go on' (*Blog Active EU* 28 October 2016) <<https://acelg.blogactiv.eu/2016/10/28/post-ceta-how-we-got-there-and-how-to-go-on-by-pieter-jan-kuijper/>> accessed 07 January 2018.

These views have been reflected in the debates that started after the signing of the EU's first agreement with an investment chapter. The initial veto of the agreement by the Belgian regional parliament of Wallonia significantly complicated the process and inspired conclusion of two declarations: Namur and Trading Together.<sup>100</sup> The former calls for strengthening of the involvement of national assemblies in the process of concluding international agreements by the EU. The latter, on the other hand, advocates for complete exclusivity in the EU trade relations and greater powers being granted to the European Parliament, which is regarded as the best source of democratic legitimacy in this area. The Trading Together declaration also takes the stance that the participation of national parliaments weakens the EU's position on the international scene.<sup>101</sup>

The saga concerning the signature of CETA demonstrates that the involvement of national parliaments complicates and prolongs the process of conclusion of the EU international investment agreement. Already prior to the emergence of the Union as an actor in the area of investment, Rosas observed that the mixed procedure may pose 'a systemic risk for an orderly conclusion of international agreements and the credibility of the EU as a negotiator'.<sup>102</sup> The recent events surrounding the conclusion of CETA, suggest that Member States are not afraid to withhold their consent to trade agreements in order to extract last minute concession, even if this means jeopardising interests of the entire Union. In this context, Bulgaria and Romania, for example, have made their ratifications conditional upon obtaining visa free travel guarantees from Canada.<sup>103</sup> Furthermore, the signature of the Treaty was blocked by the Parliament of Wallonia, one of the Belgian regions, due to its concerns over the investor-state dispute resolution mechanism,<sup>104</sup> as well as, the opening of the farming market to cheaper Canadian

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<sup>100</sup> Namur Declaration of 5 December 2016 <<http://declarationdenamur.eu/en/>> accessed 28 January 2018; Trading Together Declaration of 27 January 2017 <<https://www.trading-together-declaration.org/>> accessed 28 January 2018.

<sup>101</sup> Ibid.

<sup>102</sup> Allan Rosas, 'The Future of Mixity' in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: the EU and Its Member States in the World* (Hart Publishing 2010), 369.

<sup>103</sup> Council (EU), Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part – Statements of the Council minutes, (27 October 2016) 13463/1/16 REV 1, paras 34,35.

<sup>104</sup> Guillaume Van der Loo, 'CETA's signature: 38 Statements, a joint interpretative instrument and uncertain future', CEPS Commentary, 31 October 2016 <<https://www.ceps.eu/publications/ceta%E2%80%99s-signature-38-statements-joint-interpretative-instrument-and-uncertain-future>> 28 January 2018.

products and industrial imports.<sup>105</sup> The European Parliament, on the other hand, approved the agreement by 408 votes to 254 with 33 abstentions.<sup>106</sup>

The continued use of the mixed procedure undermines the attainment the Lisbon objectives, one of which, as evaluated in the first part of this chapter, was to improve efficiency of the EU's external action. It is apparent from the changes that have been introduced that this goal in the context of the CCP was to be achieved through expanding the scope of the EU's exclusive competences and enhancing the role of the European Parliament to ensure adequate representation of the EU citizens. These two amendments were intended to reduce the importance of the mixed procedure. However, in the light of the Opinion 2/15, the involvement of the national parliaments has to be endured for the foreseeable future in the sphere of international investment.<sup>107</sup>

Although this configuration significantly weakens the position of the European Parliament, it can be also considered as consistent with the neofunctionalist depiction of the process of integration as gradual and incremental.<sup>108</sup> Thus, the task ahead of the European Parliament, as an actor in the process of integration concerned with increasing its own powers, is to cultivate pressures that exist within the current structures in order to present a convincing case for further transfer of competences to the Union.<sup>109</sup> Therefore, from the perspective of the institutional balance, European Parliament is another sources of positive forces supporting the Commission's efforts to further the process of integration in the CCP. The Parliament demonstrated that it subscribes to such role in the Opinion 2/15, where it advanced the arguments that the EU's competence in the sphere of investment should be exclusive, which were in support of the Commission's position.<sup>110</sup>

However, securing completely supranational character of the CCP presents itself as a difficult task in the light of the countervailing forces, which originate mainly from the Council, evaluated in greater detail in Chapter 5. In relation to this, the Council generally

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<sup>105</sup> Hans von der Burchard, Simon Marks and Alberto Mucci, 'Wallonia Sends EU Trade Policy Back to the Drawing Board' *Politico* (Europe Edition 24 October 2016) <<https://www.politico.eu/pro/pm-charles-michel-tells-eu-that-belgium-cannot-sign-canada-deal/>> accessed 7 January 2018.

<sup>106</sup> European Parliament/Legislative Observatory <<http://www.europarl.europa.eu/oeil/popups/summary.do?id=1476916&t=e&l=en>> accessed 28 January 2018.

<sup>107</sup> Opinion 2/15 (n 7).

<sup>108</sup> Haas (n 40) XX.

<sup>109</sup> Niemann (n 1) 24.

<sup>110</sup> Opinion 2/15 (n 7) para 18.

prefers mixed agreements in high profile negotiations to preserve the maximum visibility of the Member States and looks unfavourably at the European Parliament as the sole source of the democratic legitimacy in the area of the EU external action. This was particularly visible in the Council meeting concerning the signature of CETA, during which majority of Member States supported the mixed nature of the agreement, underlining the political importance of all national parliaments' consent.<sup>111</sup>

The considerable strength of the countervailing forces stemming from the Council was manifested in the Commission's acquiescence to the conclusion of CETA as a mixed agreement, before the CJEU rendered its decision on this matter.<sup>112</sup> The conclusion of the agreement with Canada coincided with the negative outcome of the UK's referendum on its membership in the EU. This negative integrative climate has heightened feelings of sovereignty consciousness in the Council, which in the neofunctionalist framework constitutes the strongest type of countervailing forces.<sup>113</sup> Thus, in the light of the political pressure, the Commission gave in to the Council's demands to use the mixed procedure, despite striving for expansive interpretation of the EU investment competences before the CJEU, which was more aligned with its institutional interests.<sup>114</sup>

#### **4.6. The European Parliament's Contribution to the Development of the EU's International Investment Policy**

Despite the Council's opposition, greater role of the European Parliament in the CCP allows to attain the objectives of increased legitimacy and improved effectiveness. There is no doubt that the involvement of national parliaments in conclusion of international treaties complicates and prolongs the process. In the absence of Treaty rules, the currently used mixed procedure, which has developed in the EU constitutional practice gives each national parliament a veto power over not only parts of the agreements that fall within the scope Member States' powers, but also those that have been already transferred to the EU. This significantly undermines the Union's ability to establish itself as credible actor in the field, which was demonstrated during the conclusion of CETA. Moreover, the

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<sup>111</sup> Council (EU), 'Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, on the Other Part – Statements of the Council Minutes' 13239/16 WTO 288 SERVICES 25 FDI 21 CDN 21.

<sup>112</sup> Commission, 'Press Release European Commission Proposes Signature and Conclusion of EU-Canada Trade Deal' (5 July 2016), <[http://europa.eu/rapid/press-release\\_IP-16-2371\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2371_en.htm)> accessed 28 January 2018.

<sup>113</sup> Niemann (n 3) 10.

<sup>114</sup> Commission (n 112).

participation of the parliaments of the Member States increases the risk of corrupting the EU's trade negotiations with often difficult to reconcile national interests and protectionist behaviour. This adds to the dialectical process of integration another source of countervailing forces.

Nonetheless, perhaps the preference of the Member States for mixed procedure indicates that the European Parliament is not a sufficient source of democratic legitimacy in relation to international investment agreements, which are perceived to deeply affect domestic legislative frameworks of Member States.<sup>115</sup> In this context, Cygan point out that the paradox of EU democratisation is that the legislative process is being removed further away from the citizens through increasing powers of the European Parliament and reduction in the involvement of national parliaments.<sup>116</sup> In relation to the emerging EU investment policy, a closer cooperation between these two sources of democratic legitimacy in EU foreign relations could improve the efficiency of the mixed procedure.

However, for the moment the power struggle between the national parliaments and the European Parliament for the position of the source of democratic legitimacy for the common investment policy continues. The ability of the European Parliament to closely monitor the negotiations of the EU investment treaties, puts it in a more advantageous position in comparison to the national parliaments.<sup>117</sup> The latter have the ability to scrutinise the agreement only after parties concluded the negotiating phase and reached an agreement in principle, hence unlike their EU counterpart, national assemblies cannot shape the content of the EU investment treaties without undermining the whole deal. Thus, the Parliament could use this advantage to prove to the national parliaments that it is capable of effectively representing interest of their citizens, which increase the strength of the positive forces in the process of integration in the CCP and creates conditions for further transfer of competences.

Despite the non-exclusive nature of the EU's competences in the sphere of investment, the European Parliament has actively contributed to the development of the EU investment policy. From the perspective of the institutional balance, the EU investment policy has presented itself as a perfect opportunity for the European Parliament to

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<sup>115</sup> Kyla Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science' in Chester Brown, Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP 2011).

<sup>116</sup> Adam Cygan, *Accountability, Parliamentarism and Transparency in the EU: The Role of National Parliaments* (Edward Elgar Publishing 2013).

<sup>117</sup> TFEU, Article 207.



establish its voice in the CCP. Unlike in the case of the international trade, which until the entry into force of the Treaty of Lisbon 2009 has been controlled by the EU's executive branch, the newly emerging international investment policy has been an empty canvas for determining the new institutional interplay. Thus, the European Parliament has tried to make a meaningful contribution into shaping of the content of the EU's international investment agreements since the inception of the new policy.<sup>118</sup>

As evaluated below, in the context of emerging common investment policy, the European Parliament defended interests, such as: right of the Member States to pass regulations in public interests, greater legitimacy of the dispute resolution system, as well as, inclusion of human rights, labour and environmental standards. From the perspective of the interinstitutional dynamic, the Parliament's actions to large extent, have supported and reinforced the Commission's efforts to reform the system of investment protection. In the neofunctionalist framework, this is consistent with the institutional interests of the European Parliament, as the continued future action of the EU in the field of international investment increases its powers and zone of influence. As evaluated in Chapter 3, the Commission's reform proposal gives rise to functional spillover pressures, which are aimed to ensure future actions of the Union in the field and create condition for further transfer of investment powers. The analysis that follows in the section below seeks to outline the Parliament's efforts to cultivate further integrative pressure and investigate how its role as an actor in the process of integrations impacts on the institution's capability to provide democratic legitimacy to the emerging international investment policy.

#### **4.6.1. Reaffirming States' Right to Regulate**

As evaluated in Chapter 3 one of the contentious points of the EU's international investment policy has been the reform aimed at improving states' freedom to regulate in public interest, because it significantly departs from the treaty making practice of the Member States. The European Parliament has contributed to the debate concerning states' right to regulate, by challenging some of the demands initially made by the Council to

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<sup>118</sup> European Parliament, 'Resolution on the Future European International Investment Policy' (2010/2203(INI)) P7\_TA(2011)0141 (Resolution on International Investment Policy); N. Jansen Calamita, 'The Making of Europe's International Investment Policy: Uncertain First Steps' (2012) 39 *Legal Issues of Economic Integration* 301.

increase the level of protection for foreign investors.<sup>119</sup> The Parliament pointed out that in the light of the reciprocal nature of the investment treaties the EU will have to offer the same, high levels of protection to investors from third countries, which could have a detrimental effect upon the ability of the Member States and the Union to exercise their regulatory functions.<sup>120</sup> Since the EU partners in bilateral investment negotiations consist of both developed and developing states, which implies that investment will be flowing in both directions, a reform aimed at ensuring that the EU investment treaties do not unduly constrain regulatory actions in public interest benefits all Member States.

In relation to specific reform proposals, the Parliament has been in favour of the EU investment agreements expressly reaffirming states' right to regulate,<sup>121</sup> which as evaluated in Chapter 3, has been implemented by the Commission. Moreover, the Parliament has criticised investment protection standards traditionally found in the BITs, such as FET and expropriation for their vagueness, which in its view, have too often permitted an interpretation favourable to foreign investors that adversely affected states' capability to pass legislation with legitimate objectives.<sup>122</sup> To improve the balance between the protection of foreign investment and states' freedom to exercise their regulatory functions, the Resolution of the European Parliament has called for greater specificity in the definition of the basic protection standards in the EU's future investment agreements.<sup>123</sup>

The views of the Commission and the European Parliament with regards to the reform of investment protection standards have, to large extent, converged. The Parliament, for example, fully supported the Commission's amendments concerning the drafting of the expropriation provision. In relation to the fair and equitable treatment (FET), both institutions have favoured its narrower formulation, which has been implemented in the EU investment treaties. The Parliament, however, proposed to link FET to the customary international law standard,<sup>124</sup> which for the Commission did not go far enough in improving legal certainty. Nonetheless, as evaluated in Chapter 3, the current drafting of the FET provisions in the EU investment treaties meets the overall objectives of both

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<sup>119</sup> Ibid, para 17. Council (EU), 'Conclusion on a Comprehensive European International Investment Policy' (Conclusion) 3041<sup>st</sup> Foreign Affairs Council Meeting, (25 October 2010), paras 8 and 9.

<sup>120</sup> Resolution on International Investment Policy (n 117) paras 16 and 17.

<sup>121</sup> Ibid, paras 6 and 27.

<sup>122</sup> Resolution on International Investment Policy (n 117) G.

<sup>123</sup> Ibid 19.

<sup>124</sup> Ibid.

institutions and is considered to be a positive contribution towards improving states' regulatory flexibility, even by those who have been sceptical about the reforms implemented in the EU's investment treaties.<sup>125</sup>

The Parliament's support of the Commission is important in legitimising the reform proposal, in particular that the views and treaty making practice of the Member States diverge. In this context the Parliament contributed towards the Commission's strategy of persuading all Member States about the need for a systemic reform of the investment protection system, which from the perspective of furthering the process of integration in the CCP is a strong functional pressure. Thus, a positive role of the European Parliament as a source of pro-integrative forces in the dialectical process of EU integration needs to be highlighted.

Contribution of the European Parliament to the development of the common investment policy have also been important because it has helped attaining the 'outer layer' objectives of the EU external action.<sup>126</sup> The insistence upon a greater balance between states' freedom to exercise their public functions and protection of foreign investment not only benefits the EU and its Member States, but also third countries which are parties to the EU's investment agreements, in particular the developing economies. The old generation of BITs including treaties concluded by the Member States, has often been criticised for imposing unreasonable regulatory constraints upon the governments of the developing economies.<sup>127</sup> In the past the developed countries were mostly exporters of foreign investment, thus in spite of the reciprocal nature of the investment treaties, they were not experiencing liability under BITs in the same way as the governments of developing countries which have been net-importers of foreign investment. A greater regulatory flexibility provided in the new EU's investment treaties eases some of that burden which has been mostly experienced by the developing countries, and gives them more space to improve their regulatory frameworks for public welfare or environmental protection, without running a risk of a costly dispute in investment arbitration. This is consistent with broader objectives of the EU's External Action, one of which is to: "foster

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<sup>125</sup> Martins Paparinskis, 'International Investment Law and the European Union: a Reply to Catherine Titi' (2015) 26 EJIL 663.

<sup>126</sup> TEU, Art 21.

<sup>127</sup> Muthucumaraswamy Sornarajah, 'A Law for Need or a Law for Greed? Restoring the Lost Law in the International Law of Foreign Investment' (2006) 6 Int. Environmental Agreements 329.

the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty.”<sup>128</sup>

#### **4.6.2. Protection of Human Rights and Sustainable Development**

The CJEU highlighted that one of the functions of the European Parliament in EU foreign relations is to safeguard their coherence.<sup>129</sup> One of the ways in which this can be achieved is to ensure compliance of EU’s policies with the general objectives of the EU external action.<sup>130</sup> In the Resolution on the implementation of the Lisbon Treaty the Parliament has stressed the requirement that all EU investment agreements should comply with objectives set out in Article 21 TEU.<sup>131</sup> Thus, the Parliament’s first official statement outlining its new role in EU external relations has highlighted that it intends to be a determined guardian of human rights and sustainable development norms.<sup>132</sup> Furthermore, in its Resolution on the EU’s investment strategy the Parliament highlighted to the Commission that the investment agreements can be a tool that facilitates the development of the EU’s treaty partners<sup>133</sup>.

In relation to developing countries, the Parliament has insisted that EU investment agreements incorporate provisions which ensure investors’ compliance with human rights and anti-corruptions standards.<sup>134</sup> In the view of the Parliament, trade and investment agreements should not only focus on commercial goals of the Union, but should also be used as a tool to foster sustainable development and reduce poverty worldwide<sup>135</sup>. In this context, the Parliament specifically asked that the EU investment agreements include a reference to the OECD Guidelines for Multinational Enterprises,<sup>136</sup> clauses on corporate social responsibility and social and environmental standards.<sup>137</sup>

So far, in relation to the EU investment policy, the Parliament has defended values enshrined in Article 21 TEU in a constructive manner. Its capacity to participate in the interinstitutional dialogue at all stages of negotiations allowed it to defend these

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<sup>128</sup> TEU, Art 21.

<sup>129</sup> Case C-263/14 *European Parliament v Council (Tanzania)* [2016] OJ C305/04, paras 71-72.

<sup>130</sup> TEU, Art 21.

<sup>131</sup> European Parliament, ‘Implementation of the Treaty of Lisbon with Respect to the European Parliament’ (2013/2130(INI)) P7\_TA(2014)0296, para 43.

<sup>132</sup> *Ibid* para 44.

<sup>133</sup> Resolution on International Investment Policy (n 117) para 7.

<sup>134</sup> *Ibid* para 37.

<sup>135</sup> *Ibid*.

<sup>136</sup> *Ibid* para 27.

<sup>137</sup> *Ibid* para 28.

principles in a manner that does not overly politicise the process, which has been one of the concerns expressed with regards to the parliamentary involvement prior to the entry into force of the Treaty of Lisbon 2009.<sup>138</sup> This strengthens the position of the European Parliament *vis-à-vis* the Member States and positively impact upon creating conditions for further integration.

Furthermore, through its contributions to the development of the international investment policy the Parliament has emerged as the guardian of EU values, which are important to EU citizens.<sup>139</sup> The Parliament has consistently reminded other EU institutions that trade should be not a goal in itself, but a mean for achieving rule of law, democracy, sustainable development, eradication of poverty, etc.<sup>140</sup> As trade and investment no longer remain in the realm of experts, the European Parliament has emerged through its actions as much needed representative voice of the EU citizens. Its contribution could help in improving public perception about the Commission's reform of the investment protection treaties and intensify the functional pressure for transferring exclusive investment competences to the EU.

#### **4.6.3. The Reform of the Dispute Resolution System**

In its role as a representative voice of the EU citizens, the European Parliament has also addressed concerns about the investor-state dispute resolution system. Following the public consultation concerning TTIP, where many citizens voiced concerns over the proposed enforcement mechanism,<sup>141</sup> the Parliament has suggested in a Resolution necessary improvements to the investor-state dispute resolution system in the EU investment agreements.<sup>142</sup> The Parliament's proposal, to large extent, aligned with the Commission's idea for reform, in particular with regards to issues, such as: that arbitrators should be publically appointed, professional judges, that consistency of awards can be ensured through an appellate mechanism, and that the transparency of arbitral

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<sup>138</sup> Pollet-Fort (n 6); Niemann (n 3).

<sup>139</sup> Resolution on International Investment Policy (n 117) para 39.

<sup>140</sup> Armanoviča and Bendini (n 31) 8.

<sup>141</sup> Commission, 'Commission Staff Working Paper: Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement' (Report) SWD(2015) 3 final, Brussels 13 January 2015, 15-16.

<sup>142</sup> European Parliament, 'Resolution of 8 July 2015 Containing European Parliament's Recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP)' (2014/2228 (INI)) P8\_TA(2015)0252,(xv).

proceedings should be enhanced.<sup>143</sup> As evaluated in Chapter 3, the EU investment treaties implement all abovementioned reforms concerning the structure and composition of the new dispute resolution body and also incorporate the UNCITRAL Rules on Transparency in treaty-based Investor-State Arbitration, which enable public access to documents and participation by non-disputing parties.<sup>144</sup>

These changes, however, may not go far enough to satisfy the demands of EU citizens. The Wallonia's veto of the signature of CETA and growing public discontent with the investment protection treaties in capitals of the EU Member States indicates that many EU citizens oppose the system all together and want its abolition. In this context, the role of the European Parliament as a self-interested actor in the process of EU integration may prevent it from adopting a more radical position that aligns with the abovementioned views of some EU citizens and national parliaments. Exclusion of an investor-state dispute resolution from EU investment agreements would most likely preclude further development of the common investment policy. As a consequence the Parliament's zone of influence would shrink, which according to the assumptions of the neofunctionalist theory of integration is contrary to its interests.

To that end, the position of the Parliament could reflect the difficult turf war it has had to endure for years before becoming an actor in the sphere of the CCP. As demonstrated above, this struggle has not ended with the entry into force of the Treaty of Lisbon 2009. In the post-Lisbon interinstitutional conflict, the Parliament numerous times aligned its position in relation to EU investment policy with that of the Commission. This could be considered a strategy to maximise its influence in the CCP.<sup>145</sup> Although the Parliament's support adds legitimacy to the Commission's reform proposal and increases integrative pressures, the institution must be careful that the interinstitutional power play does not undermine its role as the provider of a representative voice of EU citizens in the EU

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<sup>143</sup> European Parliament, 'Resolution on the Future European International Investment Policy' (2010/2203(INI)) P7\_TA(2011)0141, para 31.

<sup>144</sup> UNCITRAL Rules on Transparency in Treaty –based Investor-State Arbitration (effective date, April 2014). Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part and the European Union on and its Member States, of the other part (CETA)(signed 30 October 2018) [2017] OJ L11/23, Chapter Eight; ; EU-Vietnam Free Trade Agreement: Agreed Text as of January 2016 (EU-Vietnam FTA), Art 20 <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>> accessed 8 January 2018.

<sup>145</sup> Niemann (n 1) 144.

investment policy, because that would weaken its position *vis-à-vis* the national parliaments.

#### **4.7. Increasing Impact of the European Parliament's Contribution to the Development of the Common Investment Policy**

In addition to making specific suggestions for improving the substantive content of the EU's investment agreements the European Parliament has also called for an EU template, which could provide a comprehensive framework for all negotiations.<sup>146</sup> This suggestion, however, has not been met with the support of the Commission.<sup>147</sup> Already in its initial Communication on the strategy for the EU's international investment policy, the Commission has strongly rejected a possibility for developing a Model BIT.<sup>148</sup> The rationale given for such a policy choice has been a need for flexibility in the negotiations. The Commission considered that one-size-fits all model for investment agreements was "neither feasible nor desirable"<sup>149</sup>. In its opinion such a solution would not allow for taking into account interests of various stakeholders in specific negotiating contexts and would prevent the EU from adjusting the standards of investment protection in accordance with the level of development of its negotiating partners.<sup>150</sup> In the response to the European Parliament's Resolution, the Commission further reaffirmed its view that the development of the EU Model BIT does not meet the objectives of the EU's investment policy, which is to customise the negotiating text to each treaty partner.<sup>151</sup> In this interinstitutional disagreement, the Commission's view has so far prevailed, albeit the European Parliament has not further pursued the issue. The European Parliament's acquiescence reflects its relatively weak position *vis-à-vis* the EU executive.

A possible way in which the European Parliaments could improve its position in the CCP is to further insist that the Commission develops an EU template for investment agreements. The Commission's unwillingness to adopt a model investment treaty text bewildered some commentators, as it is considered a best practice in international

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<sup>146</sup> Resolution on International Investment Policy (n 117) paras 9 and 5.

<sup>147</sup> Commission (n 77)/

<sup>148</sup> Commission (EU), 'Towards a Comprehensive European International Investment Policy' (Communication) COM (2010) 343 final, 6.

<sup>149</sup> Ibid

<sup>150</sup> Ibid

<sup>151</sup> Commission (n 77).

investment and has been traditionally followed by the most influential Member States.<sup>152</sup> The arguments presented in the initial Communication, stated that such a decision allows to maintain the highest levels of flexibility in negotiations. This justification, however, is unconvincing, in particular, if considered in the light of the recently negotiated agreements with Canada and Vietnam which are strikingly similar in relation to the substantive standards of protection.<sup>153</sup> In addition to this apparent absence of a need for a great degree of flexibility in investment negotiations due to largely standardised content of the treaties, there is no evidence that a model BIT removes all flexibility in negotiations. The rationale behind developing a model text is to use it as a gold standard for all investment negotiations, which does not preclude an introduction of specific amendments appropriate in different negotiating contexts.

From the perspective of the European Parliament, a model BIT could increase public legitimacy of the EU's investment policy by enhancing transparency and accountability. If EU citizens have a better understanding of the substantive content and the effect of the EU investment treaties, they are more likely to accept the European Parliament's representation and support the Commission's efforts to reform the system of international investment protection. The process of developing of a model text does not have to be very time consuming, as the Commission could utilize the text of already negotiated investment treaties which demonstrate a high level of convergence. The national parliaments could be involved in approving the substantive content of the EU model BIT, which would satisfy the demands for a democratic representation at the level of the Member States without undermining negotiations with individual third country partners and adversely affecting the perception of the EU as an ineffective actor in the area of international economic relations.

#### **4.8. Conclusions**

For a long time the European Parliament has tried to enhance its position in the EU external relations. Its efforts have eventually brought results with the entry into force of the Treaty of Lisbon 2009, which granted the Parliament a consent and legislative powers

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<sup>152</sup> Austria Model BIT 2008; United Kingdom Model IPPA (2008); French Model BIT (2006); Germany Model BIT (2009), Italian Model BIT 2003, Netherlands Model BIT. Chester Brown (ed.) *Commentaries on Selected Model Investment Treaties*, (OUP 2013); Calamita (n 117) 301; The National Board of Trade, 'Securing High Investment Protection for EU Investors: A Review of EU Member States' Model BITs' (2012);

<sup>153</sup> CETA, Chapter Eight, EU-Vietnam FTA, Chapter II.



in the sphere of the CCP. As demonstrated in the analysis in this chapter, the evolution of the decision making powers in the CCP, similarly to the expansion of the Union's competences has been incremental and is consistent with the assumptions of the neofunctionalist theory of integration.

Although the latest Treaty improves powers of the European Parliament, it does not end the interinstitutional power struggle. The post-Lisbon era has been marked with the European Parliament trying to establish itself as a meaningful actor in the field of EU external action and the emerging international investment policy has presented itself as a good opportunity for that. However, the position of the European Parliament in relation to the development of the common investment policy is significantly undermined through the use of the mixed procedure. In this context, the European Parliament has to share the role of providing democratic legitimacy in the CCP with all national parliaments. Nonetheless, the continuous efforts of the Parliament to enhance its powers could result in further supranationalisation of the CCP, and within the neofunctionalist framework such actions would be considered as positive forces in the process of integration.

Notwithstanding its brief involvement in the CCP, the Parliament has been able to contribute in a meaningful way to the EU's investment treaty-making practice. Its suggestions with respect to the formulation of substantive investment protection standards to large extent align with the Commission's reform proposals. Thus, the European Parliament has emerged as an important ally of the Commission that legitimises its actions and helps to cultivate further integrative pressures. Enhancing position of the European Parliament may be pivotal for the successful implementation of the EU's investment policy in particular that the involvement of national parliaments in the process of concluding EU investment treaties significantly undermines its effectiveness and position on the international scene. However, such an increased supranationalisation of the CCP through greater role of the European Parliament has been opposed by the Council, which as evaluated in the next chapter has been a source of countervailing forces in the process of integration in the CCP post-Lisbon.

## **Chapter 5.**

# **The Role of the Council of the European Union in the Development of the EU Policy on International Investment and in the Process of Integration in the CCP**

### **5.1. Introduction**

As a supranational institution the Council is the representative voice of the Member State in the CCP. Since the entry into force of the Treaty of Lisbon 2009, the Member States have demonstrated dissatisfaction with the increasing supranationalisation in EU foreign relation.

Consequently, the Council has acted in the opposite direction to the Commission and the European Parliament, i.e. against further transfer of competences to the supranational centre. As demonstrated in the analysis conducted below, in the area of EU foreign relations, the institution has systematically tried to maximise the Member States' control over the EU's external policies. From the perspective of the neofunctionalist theory, the Council can be characterised as the major source of countervailing forces in the process of integration.

In the light of the main research question, this chapter evaluates from the perspective of the neofunctionalist theory of integration the role that Council has played in the development of the EU's investment policy and the impact it has had on the process of integration in the CCP.

### **5.2. The Council within the Neofunctionalist Framework**

The primary role that the Treaty ascribes to the Council is to carry out policy-making and coordinating functions.<sup>1</sup> As described by Hayes-Renshaw and Wallace, the Council is the “fulcrum of the decision making and legislative process in the EU.”<sup>2</sup> Yet, the revised neofunctionalist theory of integration has mainly focused on the contribution of the Council Presidency to the process of integration in the CCP and has not paid much attention to the impact of the Council on cultivating integrative pressures.<sup>3</sup> Unlike the

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<sup>1</sup> Consolidated Version of the Treaty on the European Union [2016] OJ C202/13 (TEU), Art 16.

<sup>2</sup> Fiona Hayes-Renshaw and Helen Wallace, *The Council of Ministers*, (Palgrave, 2<sup>nd</sup> edn, 2006), 321.

<sup>3</sup> Arne Niemann, *Explaining Decisions in the European Union* (CUP 2006), 148.

Commission and the Parliament, the Council acts as an agent of the Member States, rather than an autonomous supranational institution that has taken a life of its own and is difficult to control. Though, as the analysis in this chapter demonstrates, the Council, consistently the neofunctionalist characteristics of the other institutions, can also be considered a self-interested actor concerned with maximising its own powers.<sup>4</sup> Its aims, however, are to secure a high degree of control for the Member States over different areas of Union's activity, which oppose those of the Commission and the Parliament. Thus, in the light of the new focus of the revised neofunctionalist framework on the dialectical nature of the process of integration, the Council has been included in this analysis as the major source of countervailing forces with respect to the future supranationalisation of the CCP.

In the CCP, the Council is responsible for defining the framework for implementation of the Union's policies falling within this field,<sup>5</sup> opening<sup>6</sup> and concluding negotiations on international agreements,<sup>7</sup> as well as coordinating the Commission's negotiating efforts.<sup>8</sup> Consequently, the Council has a pivotal role to play in the development of the EU's international investment policy. Furthermore, in the light of the non-exclusive nature of the EU's competences in the sphere of investment, the consensus among the Member States in the Council will be essential for successful implementation of the Commission's reforms evaluated in Chapter 3.<sup>9</sup>

The Treaty of Lisbon has implemented significant changes to the interinstitutional balance in the sphere of the CCP, with the most notable one being the enhancement of the role of the European Parliament, considered in the previous chapter. These amendments have reduced the influence of the Council through forcing it, for the first time, to share the legislative and treaty-making powers.<sup>10</sup> Additionally, the continuous expansion of the scope of the EU exclusive competences has been diminishing the capability of individual Member States to directly influence EU's external policies.<sup>11</sup>

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<sup>4</sup> Ibid 24.

<sup>5</sup> Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 (TFEU), Art 207(2).

<sup>6</sup> TFEU, Arts 207(3), 218(2), 218(3).

<sup>7</sup> Ibid Arts 218(5), 218(6).

<sup>8</sup> TFEU, Art 207(3), 218(4).

<sup>9</sup> See Chapter 1.

<sup>10</sup> Cf: Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts [2001] OJ C80/1, Arts 133(2), 300(3), TFEU, Arts 207(2), 218(6).

<sup>11</sup> TFEU, Art 218(8).

Finally, as evaluated in the sections below, the incomplete transfer of competences in the sphere of investment, together with the removal of the pillar structure and merging of the procedure for conclusion of EU international treaties,<sup>12</sup> from the perspective of the neofunctionalist theory created conditions for further integration in foreign relations for which there seems to be little appetite among the Member States.

The increasing supranational character of the EU foreign relations has been a source of considerable tension between the EU institutions in the post-Lisbon configuration. The Council, traditionally as the representative of national interests of the Member States,<sup>13</sup> fought to preserve as much as possible the intergovernmental character of the decision making and keep the European Parliament at bay with respect to the negotiations of international agreements. The interinstitutional ‘turf wars’ concerning the EU foreign relations is an important signal of the Member States’ discontent with their loss of influence on the international scene and the main source of countervailing forces in the process of further integration in this area. As evaluated in sections that follow, in the light of the Council’s central role in the legislative decision making and conclusion of international treaties, the ongoing interinstitutional conflict impacts on the development of the EU’s international investment policy. Moreover, the apparent disdain of the Member States with the reforms in the EU external action raises a question whether integration in the CCP has reached its limits.

These doubts reflect the rejection, by later neofunctionalist accounts, of the ‘end of ideology’, deterministic rhetoric, which assumes that spillover automatically results in further transfer of competences to the Union and the process inevitably leads to the creation of a political union.<sup>14</sup> The revised neofunctionalist framework focuses more on the impact of the countervailing forces on the process. Countervailing forces may be either stagnating, i.e. aimed at maintaining *status quo* or opposing, directed towards spillback, with sovereignty consciousness being the most extreme type.<sup>15</sup> Therefore, the new theoretical assumptions posit that the integration will move forward if the strength of positive forces in the process outweighs that of the negatives ones.<sup>16</sup> In this work the

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<sup>12</sup> TFEU, Art 218.

<sup>13</sup> Simon J Bulmer, ‘The European Council and the Council of the European Union: Shapers of a European Confederation’ (1996) 26 *Journal of Federalism* 17, 18.

<sup>14</sup> Niemann (n 3) 53.

<sup>15</sup> Ibid 48.

<sup>16</sup> Ibid 50-51.

Council is presented as the embodiment of the negative forces in the process of integration in the CCP. Consequently, the analysis in this chapter focuses on how actions of the Council sought to counteract those of the Commission and the Parliament and their likely impact on the future integration in the CCP.

### **5.3. The Council's Attitude towards the Division of Competence in the Area of Foreign Relations post-Lisbon**

As evaluated in the preceding chapter, the Treaty of Lisbon 2009, was intended to bring significant improvements to the effectiveness of the Union's external action. This objective was visible, for example, in the changes introduced in the CCP, with both the expansion of the scope the EU's exclusive competence<sup>17</sup> and enhanced role of the European Parliament.<sup>18</sup> These amendments created an expectation that the importance of the mixed procedure for conclusion of the EU's international treaties will be significantly reduced in the post-Lisbon era.<sup>19</sup> Although such an outcome would have improved the performance of the EU on the international scene, complete independence of the Union's action in foreign relations continues to be perceived by the Member States as being against their national interests, because it reduces their visibility on the international scene.<sup>20</sup> Moreover, since decisions to conclude EU-only agreements in the area of trade are taken by qualified majority vote (QMV), the ability of individual Member States to influence the direction of the Union's external policies is reduced.<sup>21</sup>

Thus, instead of transforming the EU into a more efficient international actor, the Treaty of Lisbon 2009 fuelled further interinstitutional 'turf wars'. Some of the litigation involved the classic issue of the division of competences in the sphere of foreign relations and the most notable case concerned the new FDI powers,<sup>22</sup> but there were also other instances post-Lisbon where the Council defended non-exclusive interpretation of competences that the Member States have previously decided to transfer to the EU.<sup>23</sup>

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<sup>17</sup> TFEU, Art 207.

<sup>18</sup> TFEU, Art. 218(6).

<sup>19</sup> Stephen Woolcock, 'The Treaty of Lisbon and the European Union as an Actor in International Trade' ECIPE Working Paper No 01/2010, 9; Anne Pollet-Fort, 'Implication of the Lisbon Treaty on EU External Trade Policy', Background Brief No 2 March 2010, EU Centre in Singapore, 15.

<sup>20</sup> Mauro Gatti and Pietro Manzini, 'External Representation of the European Union in the Conclusion of International Agreements' (2012) CML Rev. 1703, 1703; Allan Rosas, 'The Future of Mixity' in Christophe Hillion and Panos Koutrakos, *Mixed Agreements Revisited* (Hart, Oxford, 2010), 371.

<sup>21</sup> TFEU, Art. 207(4).

<sup>22</sup> See Chapter 1.

<sup>23</sup> Case C-114/12 *Commission v Council (Broadcasting)* [2014] OJ C394/2; C-137/12 *Commission v Council (Piracy Agreement)* [2013] OJ C367/13; Opinion 3/15 *Marrakesh Treaty to Facilitate Access to*

These actions of the Council are consistent with its depiction as an agent representing interests of the Member States seeking to maximise their control over different areas of the Union's activity. The Council was unsuccessful in all, but one of the abovementioned cases.<sup>24</sup> The Opinion 2/15, where the Council's arguments prevailed, decided on the mixed nature of the EU's investment agreements, against the Lisbon objectives, and set the direction for the integration in the CCP.<sup>25</sup>

The ruling allowed the Member States to maintain high levels of control over the development of the EU's international investment policy. Whilst the use of the mixed procedure does not *de jure* demand unanimity, *de facto* it has such an effect, because it requires that a treaty is ratified by each and every Member State in accordance with their constitutions.<sup>26</sup> As a consequence, a single Member State can veto any changes the Commission has proposed to the European Model BIT practice.<sup>27</sup> As highlighted in Chapter 3, prior to the conclusion of CETA, the Member States have demonstrated that they are not afraid to use their powers, even if such a behaviour undermines the EU's reputation as an international actor. Thus, despite good intentions, the latest Treaty reform has not brought much improvement to the effectiveness of the EU's external action in the sphere of investment with the process of implementation of the EU's new investment policy being more intergovernmental, rather than supranational in nature. Such a configuration creates an increased risk of countervailing pressures negatively impacting on the process of EU integration in the area of foreign relations.<sup>28</sup>

#### **5.4. The Council's Attitude towards the Lisbon Reform of the International Treaty Making Procedure**

The main inference from the above analysis is that the prerequisite for a successful implementation of the EU's international investment policy is the support of the Commission's actions by all Member States. However, the attainment of the consensus in the Council could prove to be difficult, not only because the investment treaties

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*Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled* (Opinion 3/15) [2017] OJ C112/3; Opinion 2/15 *Free Trade Agreement between the European Union and the Republic of Singapore* [2017] OJ C239/3 (Opinion 2/15).

<sup>24</sup> *Broadcasting* (n 23); *Piracy Agreement* (n 23); Opinion 3/15 (n 23).

<sup>25</sup> Opinion 2/15 (n 23).

<sup>26</sup> Alan Rosas, 'Mixed Union-Mixed Agreements' in Martti Koskeniemi (ed) *International Law Aspects of European Union* (Kluwer Law, the Hague, 1998), 128.

<sup>27</sup> See Chapter 2.

<sup>28</sup> Niemann (n 3) 47-50.

developed by the Commission deviate from the path taken by the Member States in their BIT programmes. From the internal perspective, the post-Lisbon era has been characterised by the Member States' rejection of the increasingly supranational character of the EU foreign relations, which has been manifested in the Council contesting the new procedure for conclusion of international treaties in numerous cases before the CJEU.<sup>29</sup> This attitude is identified as another obstacle in the way of the common investment policy.

The quest for effectiveness and coherence in the EU external representation has led to the merging of the treaty-making procedure in Article 218 TFEU, which now covers nearly all EU agreements,<sup>30</sup> including those falling within the scope of the CCP and CFSP.<sup>31</sup> The Member States have, however, expressed their deep dissatisfaction not only with the division of competences, but also the new consolidated rules governing the conclusion of international agreements. In a number of cases post-Lisbon the Council, as the representative voice of the Member States, has challenged all aspects of the new procedure governing the EU external action.<sup>32</sup> In the interinstitutional litigation, the Council sought to influence the interpretation of the procedural rules in a manner that allows it to maintain the intergovernmental nature of the decision making, shifting the balance of powers in favour of the Member States and away from the Commission and the Parliament.<sup>33</sup> Since EU investment agreements are governed by the procedure in Article 218 TFEU, actions of the Council stood to undermine the effectiveness of the Union in this field.

Moreover, a large number of interinstitutional cases brought since the entry into force of the Treaty of Lisbon 2009 which concerned EU foreign relations is indicative of the strength of the countervailing forces affecting the process of integration in this sphere. Niemann in his revised neofunctionalist account has suggested that: "a significant manifestation of these countervailing forces will considerably obstruct a (further)

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<sup>29</sup> Pieter-Jan Kuijper, 'From the Board: Litigation on External Relations Powers after Lisbon: The Member States Reject Their Own Treaty' (2016) 43 *Legal Issues of Economic Integration* 1; Anne Pieter van der Mei, 'Case Note: EU External Relation and Inter-institutional conflicts. The Battlefield of Article 218 TFEU' (2016) 23 *MJ* 1051, 1052.

<sup>30</sup> Agreements concerning monetary policy are covered by Article 219 TFEU.

<sup>31</sup> Gatti and Manzini (n 20) 1705-1707.

<sup>32</sup> Kuijper (n 29) 8.

<sup>33</sup> See for example: C-377/12 *Commission v Council (Philippines)* [2014] OJ C282/3, para 22; Case C-28/12 *Commission v Council (US Air Transport)* [2015] OJ C 73; C-678/15 *Commission v Council (WRC-15)* OJ C 68.

supranationalisation of the EU external trade policy.”<sup>34</sup> This inspires a question whether the current attitude of the Member States towards the divisions of competences and the procedure governing the EU external action stands in a way of future integration in the area of the CCP. The Council’s efforts to affect the interpretation of the new Treaty provisions governing foreign relations are analysed in detail in the section below in order to determine the effects of the abovementioned countervailing forces on the future implementation of the EU’s international investment policy and further integration with respect to the CCP. Since almost all aspects of the new procedure have been a subject of the interinstitutional turf war, the analysis begins with the first step in the life cycle of EU international agreements, i.e. the decision to open negotiations, and ends with the provisional application and conclusion of treaties with third countries.

#### **5.4.1. The Opening of Negotiations**

Despite the objective to increase coherence in EU external relations, the new procedural rules have not removed uncertainty surrounding mixed agreements. Insofar as the opening of negotiations is concerned, the Council attempted to exploit the existing Treaty ambiguities to enhance the influence of the Member States. Article 218 TFEU, which requires the Council to issue a decision on the opening of negotiations and to nominate a negotiator by qualified majority vote<sup>35</sup> applies only to agreements or their parts which fall within the EU’s exclusive competences.<sup>36</sup> Thus, commencement of negotiations of a mixed agreement should in theory require an additional, unanimous decision authorising the Commission to represent the Member States on matters which remain within the scope of their powers.<sup>37</sup>

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<sup>34</sup> Arne Niemann, ‘Conceptualising Common Commercial Policy Treaty Revision: Explaining Stagnancy and Dynamics from Amsterdam IGC to the Treaty of Lisbon’ (2011) 15 *European Integration Online Papers*, 10. <<http://eiop.or.at/eiop/>> accessed 5 January 2017.

<sup>35</sup> TFEU, Articles 218(2), 218(3), 218(8).

<sup>36</sup> Case C-28/12 *Commission v Council (US Air Transport)* [2015] Opinion of AG Mengozzi, para 44.

<sup>37</sup> See for example: Council, ‘ASEAN/Singapore: shift to bilateral negotiating approach with ASEAN and launch of bilateral FTA-negotiations with Singapore as a first step’ (2009) 17494/09 DCL 1; Council, ‘Decision of the Representatives of the Governments of the Member States, Meeting within the Council authorising the European Commission to negotiate, on behalf of the Member States, the investment protection provisions within Free Trade Agreements with countries of the Association of South Asian Nations (ASEAN) that fall within the competences of the Member States’ (2013) 14096/13 LIMITE; Gatti and Manzini (n 20) 1713-1714. However, it is not always the practice that two decisions are adopted for the purpose of negotiating a mixed agreement, see for example: Council, ‘Recommendation from the Commission to the Council on the Modification of the Negotiating Directive for an Economic Integration Agreement with Canada in Order to Authorise the Commission to Negotiate, on behalf of the Union, on Investment’ (2015) 12838/11 EXT 2.



It became apparent in two recent cases that the Council tried to affect the constitutional practice in the area of EU external relations in a manner that would permit Member States to open negotiations of mixed agreements with a single unanimous vote, through adoption of so called ‘hybrid decision’.<sup>38</sup> The Council argued that in the absence of Treaty provisions it should be free to choose its own procedure applicable to mixed agreements and unsurprisingly it opted in for an intergovernmental practice.<sup>39</sup> The Court found that adoption of a ‘hybrid decision’ at any stage of the procedure for conclusion of mixed agreements violated Article 218(8) TFEU, which clearly prescribes that QMV applies to parts of agreements which fall within the EU’s exclusive competence.<sup>40</sup> The CJEU held that the adoption of an intergovernmental act relating to areas within exclusive competences of the Member States cannot adversely affect the supranational character of the procedure for conclusion of EU treaties.<sup>41</sup>

From the perspective of the neofunctionalism, the decision of the CJEU prevents a spillback in the process of EU integration. In this context, the Court acted as a guardian of the latest treaty reform and the incremental nature of the process of EU integration. Additionally, as pointed out by Advocate General Mengozzi, the ruling provides clarity for third countries that the EU possesses a legal personality that is independent of its Member States.<sup>42</sup> In practice, however, the judgment is unlikely to make an impact on the future EU constitutional practice with regards to negotiations of EU international investment treaties for which the mixed procedure will be used.<sup>43</sup> Although the Opinion 2/15 clarified that certain, indivisible aspects of investment competence remain with the Member States, clear delineation of competences in this area is not possible.<sup>44</sup> Consequently, it is difficult to imagine the Council adopting two separate decisions one authorising opening of negotiations on FDI, the other on non-direct investment and dispute resolution procedure. With regards to CETA, the Council passed a single decision by QMV,<sup>45</sup> but due to the non-exclusive nature of investment competence, its adoption

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<sup>38</sup> Case C-114/12 *Commission v Council (Broadcasting)* [2014] OJ C394/2; Case C-28/12 *Commission v Council (US Air Transport)* [2015] OJ C 73.

<sup>39</sup> *US Air Transport* (n 28) para 27.

<sup>40</sup> Case C-28/12 *Commission v Council (US Air Transport)* [2015] Opinion of AG Mengozzi, para 93; *US Air Transport* (n 28) para 63.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid* para 92.

<sup>43</sup> Similar opinion has been expressed by: van der Mei (n 29) 1056.

<sup>44</sup> Opinion 2/15 (n 23)

<sup>45</sup> TEFU, Art 207(4).

also required ‘common accord,’<sup>46</sup> which demands an agreement of all Member States.<sup>47</sup> Therefore, the practice of ‘hybrid decisions’ in relation to EU’s future investment agreements is expected to continue, though in a disguise. Despite the fact that this maximises the influence of the Member States, the past practice does not give a cause for concerns as the attainment of consensus among the Member States for the opening of investment negotiations have not proven problematic in the past.

#### **5.4.2. The External Representation**

The Council has also tried to expand the use of unanimity in a recent case concerning adoption of a position on behalf of the Union for the 2015 World Radiocommunication Conference (WRC-15).<sup>48</sup> The Council argued that it operated in accordance with a well-established constitutional practice that prevailed long before the entry into force of the Treaty of Lisbon 2009 and as it achieved the result in line with the Commission’s proposal, the latter’s objections were unjustified.<sup>49</sup> It became apparent during the oral hearing that since the matters contained in the Union’s position were in a close proximity to highly sensitive area of national security, some Member States insisted on unanimity to maximise their control. Thus, through its actions in relation to WRC-15, the Council sought to establish a precedent in the EU constitutional practice for conclusion of international treaties that allows for some procedural flexibility. Although such flexibility would increase the control of the Member States, it would also create legal uncertainty, by allowing the Council to opt in for unanimity, whenever a politically sensitive issue arises. Such ambiguity could have had negative effects upon all spheres of EU external action, including investment, threatening a possibility of coordinated action. Although the judgment of the Court is still pending, Advocate General Øe found that the Council’s decision to derogate from the procedure set out in the Treaty<sup>50</sup> undermined legal certainty

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<sup>46</sup> Information regarding the procedure used by the Council for adoption of the decision authorising CETA negotiation has been provided by the Public Information Service General Secretariat of the Council of the European Union on 12 October 2017.

<sup>47</sup> Council, ‘The Role of the Council in International Agreements’ <<http://www.consilium.europa.eu/en/council-eu/international-agreements/>> accessed 28 January 2018.

<sup>48</sup> Case C-687/15 *Commission v Council (WRC-15)* OJ C68.

<sup>49</sup> Information concerning party submissions of the Commission and the Council were obtained during the oral hearing on 2 May 2017.

<sup>50</sup> Art 218(9) TFEU.

and could compromise the effectiveness of the QMV.<sup>51</sup> Consequently, he advised for the contested act to be annulled.<sup>52</sup>

The enhanced supranational character of the EU external relations have also made the Council react to the divisions of powers among the institutions and since the entry into force of the Treaty of Lisbon 2009, it has launched three challenges concerning the external representation powers of the Commission.<sup>53</sup> One of these interinstitutional turf battles was fought over the competence to negotiate agreements on behalf of the EU. Case C-425/13 *Commission v Council* concerned an attempt to expand the powers of the Council in a way that would enable its involvement in defining the Union's detailed negotiating position.<sup>54</sup> Traditionally, this role has been performed by the Commission with a high degree of independence,<sup>55</sup> which as evaluated in Chapter 3 is often necessary to attain an outcome in negotiations that is not only acceptable to the EU, but also to a third country partner. The Court was not sympathetic to the Council's arguments and reaffirmed that in accordance with the institutional balance established in the Treaty, the Commission possesses autonomous powers as a negotiator, and it is not constrained to merely following detailed instruction from the Council.<sup>56</sup> The flexibility granted to the Commission has been, however, limited by the requirement to adhere to any obligations of frequent reporting as may be required by the Council's special committee.<sup>57</sup> Although the judgment in this case safeguarded the supranational character of the EU's external action, the position taken by the Council in another signal of the Member State's appetite for greater control in this sphere, which from the perspective of neofunctionalism can be considered as a negative force in the process of integration.

In relation to the EU external representation, the Council also tried to undermine the powers of the Commission to adopt a position on behalf of the Union before an international tribunal.<sup>58</sup> In the light of the Commission's active role in investor-state

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<sup>51</sup> Case C-687/15 *Commission v Council* [2017] OJ C68, Opinion of AG Saugmandsgaard Øe, paras 66, 67, 93.

<sup>52</sup> *Ibid* para 93.

<sup>53</sup> Case C-425/13 *Commission v Council (Negotiating Directives)* [2015] OJ C 311; Case C-409/13 *Commission v Council (MFA)* [2015] OJ C274; Case C -73/14 *Commission v Council (ITLOS)* [2015] OJ C93.

<sup>54</sup> *Negotiating Directives* (n 53) paras 65-66 and 85-89.

<sup>55</sup> Piet Eeckhout, *EU External Relations Law* (2<sup>nd</sup> ed, OUP 2011) 197-198.

<sup>56</sup> *Negotiating Directives* (n 53) paras 90-91.

<sup>57</sup> *Negotiating Directives* (n 53) paras 65, 66, 85-89.

<sup>58</sup> Case C -73/14 *Commission v Council (ITLOS)* OJ C93.

disputes arising out of the existing Member States' BITs,<sup>59</sup> the case is of importance for the EU's investment policy. Despite the Council's efforts, the Court has confirmed that the Commission had the competence to represent the EU before judicial bodies without a negotiating directive,<sup>60</sup> contrary to the Council's contention.<sup>61</sup> The ruling is welcomed especially if one has a regard for the considerable number of investor-state proceedings the Commission participates in and their relatively swift nature. An outcome that would impose upon the Commission a requirement to seek the Council's approval for every *amicus curie* submission, in line with the latter's proposal,<sup>62</sup> would have had an adverse impact upon the Union's capability to formulate in a prompt manner a position in investor-state disputes involving Member States with a direct relevance for the internal market. This judgment, nonetheless, is another demonstration of the Member States rejection of the supranational character of the EU external relations and an attempt, albeit unsuccessful one, to affect the distribution of powers in a manner that favours to the principal-agent model, which maximises the control of the Member States.

#### **5.4.3. The Power Struggle between the Council and the Parliament**

The Member States' dissatisfaction with the increasingly supranational character of the EU foreign relations has also been manifested in the interinstitutional battles between the Council and the European Parliament. For example, in an official statement issued about the framework agreement concluded between the European Parliament and the Commission, the Council expressed its concerns about the expanding zone of influence of the former in relation to international treaties.<sup>63</sup> The Council threatened to take legal actions against the other institutions, as in its view the agreement violated the interinstitutional balance established in the Treaty and had a negative effect on its position.<sup>64</sup> Ott questioned the motives behind the Council's objections finding the renewed framework to be substantively similar to the previous arrangements between the Council and the European Parliament.<sup>65</sup> However, the actions of the Council are consistent with the generally unfavourable attitude of the Member States towards the

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<sup>59</sup> Fernando Dias Simões, 'A Guardian and a Friend? The European Commission's Participation in Investment Arbitration' (2017) 25 Michigan State International Law Review 233, 257-258.

<sup>60</sup> *ITLOS* (n 58) para 76.

<sup>61</sup> *Ibid* paras 44-45.

<sup>62</sup> *Ibid*.

<sup>63</sup> European Parliament and European Commission, 'Framework Agreement on Relations between the European Parliament and the European Commission' (2010) OJ L 304/47.

<sup>64</sup> *Ibid*.

<sup>65</sup> Andrea Ott, 'The European Parliament's Role in EU Treaty-making' 23 MJ 6 (2016) 1009, 1017.

increasingly supranational character of the EU foreign relations and could be considered as an attempt to defend themselves against the incremental nature of the process of EU integration and often unpredictable consequences the spillover effect.

The reasons for the conflict between the Parliament and the Council are two-fold. Firstly, as the Parliament has no consent powers in relation to agreements falling within the CFSP<sup>66</sup> the disagreement concerning the legal basis continues.<sup>67</sup> Secondly, the new consolidated procedure in Article 218 TFEU clarifies that the Parliament “shall be immediately and fully informed” at all stages of the negotiating and concluding process”,<sup>68</sup> and since the new rules apply to all international treaties, the Parliament’s right to information is also present in relation to the CFSP. Arguably, this is an enhancement of the European Parliament’s position, as the old framework was more vaguely formulated and according to Thym, the requirement in most cases was translated into a practice of ‘merely submitting a descriptive list of CFSP activities carried out in previous year’<sup>69</sup> by the Council. The Treaty of Lisbon 2009 and the litigation that followed its entry into force<sup>70</sup> reveal that the Council’s duty extends beyond its former practice.<sup>71</sup> Consequently, this recent clarification of the extent of the Council’s responsibilities *vis-à-vis* the Parliament could be considered as another example of enhancing the supranational character of the EU foreign relations, which increases the strength of countervailing forces stemming from the Council with respect to further integration in the area of foreign relations.

#### **5.4.4. The Provisional Application of EU International Treaties**

Another aspect of the procedure for conclusion of the EU international treaties, which enables the Council to influence the future development of the EU’s investment policy, is the provisional application.<sup>72</sup> In this context, the decisions on the signature and

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<sup>66</sup> TFEU, Art 218(6).

<sup>67</sup> Joined Cases C-103/12 and C-165/12 *European Parliament and Commission v Council (Fishing Quota)* [2014] OJ C 157.

<sup>68</sup> TFEU, 218(10).

<sup>69</sup> Daniel Thym, ‘Beyond Parliament’s Reach? The Role of the EP in the CFSP?’ (2006)11 EFA Rev 13, 5.

<sup>70</sup> Case C-263/14 *European Parliament v Council (Tanzania)* [2015] OJ C305, Opinion of Advocate General Kokott, para 80; Case C-263/14 *European Parliament v Council (Tanzania)* [2016] OJ C305, paras 68-70; Case C-658/11; *European Parliament v Commission (Somali Pirates)* [2014] OJ C292, para 75-81; cf. Case C-658/11 *European Parliament v Commission (Somali Pirates)* [2014] OJ C292 Opinion of Advocate General Bott, paras 141-142.

<sup>71</sup> *Tanzania* (n 70) paras 68-70; Case C-658/11; *Somali Pirates* (n 70) para 75-81.

<sup>72</sup> TFEU, Article 218(5).

provisional application of the EU's first FTA containing an investment chapter has proven to be highly controversial and was the subject of a case before the German Constitutional Court.<sup>73</sup> The judgment of the national court supported provisional application only of those parts of CETA, which fall within the exclusive competence of the EU, which was the approach followed in the later decision of the Council.<sup>74</sup> Thus in the light of the CJEU's judgment in the Opinion 2/15, the provisions concerning investment protection and investor-state dispute resolution system have been precluded from having an immediate effect.<sup>75</sup> The final decision came in spite of the views in support of a broad and immediate application of the entire agreement previously expressed by some Member States.<sup>76</sup>

As a consequence, considerable amount of time will have to pass before the FDI protection guarantees of EU's first investment chapter become effective, especially in the light of the applicability of the mixed procedure. The provisional application of the EU international treaties has been considered as an important mechanism ensuring efficiency of the EU practice in foreign relations,<sup>77</sup> in particular with respect to mixed agreements, which ratification triggers decisions of at least 38 national and regional parliaments and lasts on average three years.<sup>78</sup> As the Commission concludes investment treaties on a bilateral basis it remains to be seen whether the provisional application of Free Trade Agreements (FTA) with Vietnam and Singapore, which also contain investment chapters, will be equally complex. Nevertheless, the CETA saga raises question about the

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<sup>73</sup> Bundesverfassungsgericht, 'Applications for a preliminary injunction in the "CETA" proceedings unsuccessful'

<<https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-071.html>>  
21 October 2017.

<sup>74</sup> Council Council, 'Council Decision on the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part' 10974/16 WTO 196 Services 21 FDI 17 CDN 13' WTO 194 Services 19 FDI 15 CDN 11 (Decision on Provisional Application of CETA).

<sup>75</sup> Opinion 2/15 (n 23).

<sup>76</sup> [Unofficial] European Commission: Notes on the Meeting of the Trade Policy Committee (members), (*Politico* July 2016), <http://www.politico.eu/wp-content/uploads/2016/08/Notes-TPC-July-15.pdf> (accessed on 20 June 2017).

<sup>77</sup> David Kleimann and Gesa Kübec, 'The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU: The Case of CETA and Opinion 2/15' (2016) EUI Working Paper No 2016/58 <<http://cadmus.eui.eu/handle/1814/43948>> accessed 07 January 2018; Mauro Gatti, 'Provisional Application of EU Trade and Investment Agreements: A Pragmatic Solution to Mixity Issues' in Katia Fach Gómez, *La Política de la Unión Europea en Materia de Derecho de las Inversiones Internacionales* (JB Editor, 2017), 43.

<sup>78</sup> Kleimann and Kübeck (n 77) 1; Frank Hoffmeister, 'Curse or Blessing? Mixed Agreements in Recent Practice' Christophe Hillion and Panos Koutrakos (eds) *Mixed Agreements Revisited: The EU and Its Member States in the World* (Hart Publishing 2010), 256.

effectiveness of the EU as an actor in international investment and undermines the objectives of the Lisbon reforms in the area of EU External Action.

The events surrounding the signature of CETA, have also raised considerable legal uncertainty about the effects of the Council's decision on provisional application. Following the decision of the German Constitutional Court, which held that Germany should be able to unilaterally terminate provisional application of CETA,<sup>79</sup> number of Member States included statements reserving such a right in the Council minutes, which followed the EU decisions on signature and provisional application of CETA.<sup>80</sup> Notwithstanding the position taken by some Member States, a possibility of a single Member State terminating provisional application of an entire mixed agreement has been dismissed as contrary to the principles of primacy of Union law and conferral.<sup>81</sup> This argument is particularly relevant in the context of CETA where the provisional application is limited only to parts of the agreement which fall within the scope the Union's exclusive powers; hence the decision about its termination ought to be rendered by the Council following the procedure specified in the Treaty, which dictates QMV.<sup>82</sup> Nonetheless, the process of CETA's signature highlighted that the Member States consider themselves to be autonomous parties to the EU mixed agreements, which in the context of EU integration is another example of a countervailing force, preventing the Union from speaking with one voice.

#### **5.4.5. The Conclusion of EU International Treaties**

The last issue, with regards to the procedure in Article 218 TFEU concerns the conclusion and entry into force of international treaties negotiated by the EU. In this context, the Council together with the European Parliament and the national parliaments are responsible for ratification of the EU investment agreements, insofar as they the mixed procedure applies.<sup>83</sup> In this regard, securing support of all Member States with respect to investment protection provisions and investor-state dispute resolution mechanism may prove challenging. The signature of CETA has demonstrated that the Member States have

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<sup>79</sup> Kleimann and Kübeck (n 77) 20.

<sup>80</sup> These include: Germany, Austria, Belgium and Poland. Council, 'Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, on the Other Part – Statements of the Council Minutes' 13239/16 WTO 288 SERVICES 25 FDI 21 CDN 21, paras 21, 22, 37.

<sup>81</sup> Gatti (n 77) 54-55; Kleimann and Kübeck (n 77) 20.

<sup>82</sup> TFEU, Art, 218(8) and Art 218(9).

<sup>83</sup> Ibid Arts 207(3) and 218(6).

serious reservations in relation to the investor-state dispute resolution system and the reforms introduced by the Commission to thereof. In the Council minutes, which accompanied the decision on the signature of CETA, Slovenia has acknowledged the highly sensitive nature of negotiations concerning this aspect and Poland demanded inclusion of persons with excellent knowledge of the Polish legal system among the members of the investor-State tribunal.<sup>84</sup> The most problematic, however, appears to be the statement made by Belgium, in which it rejected the version of the investor-state dispute resolution mechanism that is currently contained in CETA and put the question about the compatibility of the proposed multilateral investment court before the CJEU.<sup>85</sup> As evaluated in the final chapter of this thesis the answer to this question is highly uncertain. Thus, a lack of unanimous support of the Commission's efforts to reform of the system of international investment protection and investor-state dispute resolution system appears to be a major obstacle in the way of an effective implementation of the EU's international investment policy, especially that given the mixed nature of the EU treaties an opposition of a single Member States can jeopardise the future of the entire policy.

#### **5.4.6. 'The Movement Is Everything' – Fear of Spillover as a Reason Behind the Council's Countervailing actions**

Although the Council has not enjoyed much success in trying to affect the procedure for conclusion of the EU international treaties, cases mentioned in this chapter are a clear signal of the Member States' opposition against increased levels of integration in the sphere of foreign relations and their concerns regarding the course of the most recent reforms.<sup>86</sup> The Treaty of Lisbon 2009, just like its predecessors, made steps forward on the path towards further integration by extending, for example, applicability of the qualified majority vote,<sup>87</sup> increasing the role of the European Parliament and dispensing

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<sup>84</sup> Council, 'Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, on the Other Part – Statements of the Council Minutes' 13239/16 WTO 288 SERVICES 25 FDI 21 CDN 21, paras 23, 25.

<sup>85</sup> Ibid para 37; Court of Justice, 'Request for an Opinion Submitted by the Kingdom of Belgium Pursuant to Article 218(11) TFEU (Opinion 1/17)' OJ C369/2.

<sup>86</sup> Kuijper (n 29) 11.

<sup>87</sup> This has also happened in the context of CFSP. Despite the fact that unanimity still remains the primary decision making mode, Article 31(2) and 31(3) TEU have added cases in which the Council may derogate from this rule and apply qualified majority vote instead. See: Panos Koutrakos, 'Primary Law and Policy in EU External Relations: Moving Away from the Big Picture' (2008) 33 ELRev. 666, 668; Alan Dashwood, 'The Relationship between the Member States and the European Union/ European Community' (2004) 41 Common Market Law Review 355, 373.



with the pillar structure.<sup>88</sup> However, the Member States' steadfast resistance against the recent reforms raises concerns about the strength of the countervailing forces affecting the process of integration in the EU foreign relations. Thus, the question that arises is whether the process of integration with regards to the CCP has reached its limits.

A contentious aspect of the recent reforms that could be causing unease among the Member States with regards to the direction of the future integration is that the unified treaty making procedure in Article 218 TFEU applies also to the sphere of the Common Foreign and Security Policy (CFSP).<sup>89</sup> Although Article 218 TFEU preserves the distinct nature of this policy area,<sup>90</sup> the pillar structure no longer insulates it from the possible effects of the spillover.<sup>91</sup> In this context, a quote by Eduard Bernstein that the final aim was nothing, *the movement was everything* depicts well why the recent reforms have been received with reluctance by the Member States.<sup>92</sup> This statement was used by Majone, to describe the nature of cryptofederalism who in this context criticised the 'Monnet Method' for pursuing multiple objectives with a single policy, to that end he said: 'it is never clear whether European policies are initiated in order to solve some concrete problems which cannot be tackled at the national level, or whether they are to serve some unstated (institutional or political) objectives.'<sup>93</sup>

Since the Commission and the Court have been known to push the limits established by the Treaty drafters to advance European integration,<sup>94</sup> it would be unsurprising if the Member States questioned, whether what is disguised behind the quest for coherence in reforming the EU procedure for conclusion of international treaties in Article 218 TFEU, are objectives to advance the integration in the sphere of the CFSP. The fear of future loss of competences over the entire sphere of the EU foreign relations could be a factor

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<sup>88</sup>Kuijper (n 29).

<sup>89</sup> Although as evaluated in Chapter 1, contribution of the Treaty of Lisbon 2009 to the process of integration in the sphere of the CCP is apparent, commentators also point this out with respect the CFSP, see: Peter van Elsuwege, 'EU External Action after the Collapse of the Pillar Structure: In Search of a New Balance Between Delimitation and Consistency' (2010) 47 Common Market Law Review 987,993; Ricardo Gosalbo Bono, 'Some Reflections on the CFSP Legal Order' (2006) 43 Common Market Law Review 337, 393.

<sup>90</sup> Koutrakos (n 87).

<sup>91</sup> It has been pointed out that the depillarisation could be exploited to trigger further integration in the CFSP and eventually could bring an end to the possibility of the Member States pursuing independent action in the sphere of foreign policy. See: Editorial Comments, 'The CFSP under the EU Constitutional Treaty – Issue of Depillarisation' (2005) 42 Common Market Law Review 325; Gosalbo Bono (n 89) 394.

<sup>92</sup> Peter Gay, *The Dilemma of Democratic Socialism* (Collier Books, 1962), 74.

<sup>93</sup> Giandomenico Majone, 'The Common Sense of European Integration' (2006) Journal of European Public Policy 607, 612.

<sup>94</sup> Ibid 616.

that fuels the Member States resistance against their own treaty provisions.<sup>95</sup> This attitude impacts not only the sphere of the CFSP, but also directly and indirectly affects Union's external action in other areas, including the CCP. As positive integration forces can unintentionally spillover onto other areas of the Member States' competences, the same is true with respect to the acts which have the spillback effect.<sup>96</sup>

## **5.5. The Council's Impact on the Legislative Framework for Implementation of the EU's Investment Policy**

### **5.5.1. The Transitional Framework**

As is apparent from the above analysis, the Council's resistance towards the enhanced supranational character of the EU External Action derives from its institutional objective of trying to preserve high level of Member States' influence in this area of the Union's action. Moreover, the gradual procedural changes create a possibility of greater integration in other areas of the EU foreign relations, which could further increase the strength of the countervailing forces stemming from the Council. This seems like a particularly relevant threat to the powers of the Member States if viewed from the perspective of incremental evolution that occurred over time in the sphere of the CCP, which eventually led to its almost entirely supranational character.

Moreover, the increasingly supranational character of different spheres of the EU's activity not only diminishes influence of the individual Member States, but also that of the Council. Thus, the Council's actions are not only consistent with its role as an agent of the Member States, but also can be ascribed to its role of an actor in the process of the EU integration that aims to maximise its powers *vis-à-vis* other supranational institutions.<sup>97</sup> In this context, the increasing competences of the European Parliament, which resulted from its deliberate efforts to democratise all spheres of EU's action, have had a direct effect upon the position of the Council in the CCP, requiring the institution to share its legislative powers for the first time after over fifty years of executive dominance in the sphere of the EU's international trade policy,<sup>98</sup>. In this context,

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<sup>95</sup> Kuijper's conclusions in relation to the post-Lisbon interinstitutional 'turf wars' concerning the reforms in foreign relations is that the "Member States did not want their own creation any longer whether old or new." Kuijper (n 29) 12-13.

<sup>96</sup> Niemann (n 34) 10.

<sup>97</sup> Niemann (n 3) 44.

<sup>98</sup> The evolution of the European Parliament's powers in the sphere of trade and investment policy is described in further detail in Chapter 3.

Dashwood observed that the traditional dialogue between the Council and the Commission has become a trilogue where ordinary legislative procedure applies,<sup>99</sup> and this includes the framework for implementation of the CCP.<sup>100</sup>

In the context of investment, the first test of the interplay between now three institutions came during the negotiation of Regulation 1219/2012.<sup>101</sup> The Transitional Arrangements Regulation was the first instrument in the framework for implementation of the EU's investment policy enacted with the involvement of the European Parliament.<sup>102</sup> Its purpose was to provide legal clarity with respect to existing Member State BITs in the post-Lisbon era, where the competence to conclude such treaties has been transferred to the EU.<sup>103</sup> This first interaction between the European Parliament and the Council proved to be difficult,<sup>104</sup> with no agreement reached at the first reading.<sup>105</sup> Despite the fact that the Parliament asked for some modifications to the legislative proposal, it largely supported the position of the Commission. The Council, however, proposed significant amendments to the framework for replacing existing Member States' BITs.

Even though, the Parliament and Council normally seek to achieve a consensus in informal trilogues to prevent going into the second reading, this was not possible in the context of the Regulation 1219/2012.<sup>106</sup> Since it was the first legislative negotiation concerning investment policy, a power play between the two institutions could have been a factor that made reaching a consensus more onerous. Although the Parliament has proven that it has a voice in the legislative negotiations it also adopted a position that very closely aligned to that of the Commission and was aimed at creating a functional

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<sup>99</sup> TFEU, Art 294.

<sup>100</sup> TFEU, 207(2).

<sup>101</sup> Regulation 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries [2012] OJ L351/40 (Transitional Arrangements Regulation).

<sup>102</sup> The second is: Regulation 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party [2014] OJ L257/121 (Financial Responsibility Regulation).

<sup>103</sup> Transitional Arrangements Regulation, Recital 6.

<sup>104</sup> Council, '3154<sup>th</sup> Council Meeting. Foreign Affairs: Trade (Press Release)' (2012) 7543/12 PRESSE 105 PR CO 15. 6.

<sup>105</sup> Council, 'Council Agrees Transitional Rules on Bilateral Investment Treaties (Press Release)' (2012) 11876/12 PRESSE 294.

<sup>106</sup> Lack of consensus at the first reading happens rarely. In the legislative term 2004-2009 only 10.8% of the legislative acts had to go to the second reading, between 2009-2014 only 8%. Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (6<sup>th</sup> edn, OUP 2015), 131.

structure that would have facilitated further integration in the CCP.<sup>107</sup> The Council, however, displayed considerable bargaining powers and maintained the position of the most influential actor in the legislative process.

The Regulation on transitional arrangements was of vital importance to the Member States. Whilst majority of the Member States possess extensive networks of BITs that predate the Treaty of Lisbon 2009,<sup>108</sup> they required reassurance that the effectiveness of the existing legal framework for protection of international investment in the EU would not be adversely affected by the development of the common policy. Although the existing treaties remained binding as a matter of international law,<sup>109</sup> there was a possibility to question their compatibility with EU law after the transfer of the FDI competence to the Union.<sup>110</sup> If such ambiguity persisted, there was an increased likelihood of a challenge of the validity of the Member States' BITs before the CJEU, which has the discretion to ask even for their denunciation in cases of incompatibility with EU law.<sup>111</sup> Such a situation would have created legal uncertainty among foreign investors, which potentially could have had adverse effects on the investment flows between the Member States and third countries. Consequently, in the period of transition, the Member States sought unequivocal guarantee from the Commission that it is not going to challenge the conformity of existing BITs with the EU Treaty.<sup>112</sup> To that end the main aim of the Council was to ensure the validity of the existing network of Member

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<sup>107</sup> Council '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 – Political Agreement' (2012) Interinstitutional File 2010/0197 (COD) 10892/12, 2; European Parliament, 'Legislative Resolution of 11 December 2012 on the Council position at First Reading with a view to the adoption of a Regulation of the European Parliament and of the Council Establishing Transitional Arrangements for Bilateral Investment Agreements between Member States and Third Countries' (2012) (11917/1/2012 – C7 – 0338/2012- 2010/0197 (COD)) P7\_TA(2012)0471.

<sup>108</sup> See Chapter 2.

<sup>109</sup> Vienna Convention on the Law of Treaties, Concluded at Vienna on 23 May 1969, Article 26 and 27. This has been also acknowledged in the Regulation 1219/2012. Transitional Arrangements Regulation, Recital 5. This also applies with regards to intra-EU BITs. See: Eirik Bjorge, 'EU law Constraints on Intra-EU Investment Arbitration?' (2017) 16 *The Law and Practice of International Courts and Tribunals* 71.

<sup>110</sup> Transitional Arrangements Regulation, Recitals 1, 2, 4 and 5.

<sup>111</sup> The obligation to denounce treaties concluded prior to accession to the EU could arise out of Article 351(2) TFEU, as interpreted in: Case C-62/98 *Commission v Portugal* [2000] ECR I-05171, 49 and Case C-84/98 *Commission v Portugal* [2000] ECR I-05215, 58; In relation to agreements concluded after accession the Court confirmed the same duty in Joined Cases 3/76, 4/76 and 6/76 *Officier van Justitie v Kramer* [1976] ECR 1279, para 44. On the subject of interpretation of Article 351 TFEU: Pietro Manzini, 'The Priority of Pre-Existing Treaties of EC Member States within the Framework of International Law' (2001) 12 *EJIL* 281, 786.

<sup>112</sup> The Regulation 1219/2012, as secondary EU law does not preclude an action for incompatibility of pre-existing Member States with EU law, which are rules of primary EU law. However, it minimises the likelihood of such action being brought by the Commission.

States' BITs, until they are replaced with the EU solution in order to avoid uncertainty for investors.<sup>113</sup>

This goal was shared by the Commission. Any uncertainty that could have affected inward or outward investment was not only undesirable for individual Member States, but also the internal market, as a whole.<sup>114</sup> However, the Commission had tried to use the transitional arrangements to, as Kuijper put it, “weed out” those Member States BITs, which might have proven problematic from the perspective of EU law.<sup>115</sup> Hence, in the proposal for Regulation 1219/2012, the Commission granted itself an authority to withdraw authorisation for Member State BITs, if their assessment revealed incompatibilities with EU law or an overlap with an EU investment agreement.<sup>116</sup> From the perspective of the Commission as an actor in the process of EU integration such an arrangement would have created a functional structure that allowed for timely implementation of the EU reform of investment protection standards and provided condition for future integration.

However, the countervailing forces in the Council were too strong to allow for it. The arrangement was considered to give the Commission too broad discretion to decide on the fate of the Member States' BITs and was not accepted by the Council. As a consequence the powers of the Commission have been considerably curbed,<sup>117</sup> with the final version of the Regulation allowing it to evaluate only if existing Member States BITs “constitute a serious obstacle to the negotiation or conclusion by the Union of bilateral investment agreements with third countries,”<sup>118</sup> Furthermore, identifying by the Commission that a particular Member State treaty constitutes a ‘serious obstacle’ does not automatically result in a withdrawal of an authorisation, as per Commission’s

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<sup>113</sup> Council Press Release, ‘3154<sup>th</sup> Council Meeting. Foreign Affairs: Trade’ (2012) 7543/12 PRESSE 105 PR CO 15, 6; Council, ‘Position No 11/2012 at First Reading, with a View to the adoption of a Regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreement between Member States and Third Countries’ (2012) C 352 E/23, 30.

<sup>114</sup> Commission, ‘Towards a comprehensive European international investment policy’ (Communication) COM (2010) 343 final, 2; Commission, 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 (Transitional Arrangements Regulation), Brussels 7 July 2010, COM(2010)344final, 2.

<sup>115</sup> Kuijper (n 29) 267.

<sup>116</sup> Transitional Arrangements Regulation, Articles 5 and 6.

<sup>117</sup> Frank Hoffmeister and Güneş Ünüvar, ‘From BITS and Pieces towards European Investment Agreements’ in Marc Bungenberg, August Reinisch, Christian Tietje (eds), *EU and Investment Agreements* (Nomos 2013) 83.

<sup>118</sup> Transitional Arrangements Regulation, Article 5.

proposal.<sup>119</sup> Upon insistence of the Council, the Transitional Regulation establishes a system of close cooperation between the Commission and the Member States,<sup>120</sup> requiring them to engage in consultations for a period of 90 days with a view to remove any incompatibilities between BITs and EU Treaty.<sup>121</sup> The Commission, however, retained the ultimate power to bring consultations to an end and prescribe measures to be adopted by a Member States to correct an incompatibility.<sup>122</sup>

Although the notion of a ‘serious obstacle’ remains vague, it can be considered a higher threshold for withdrawal of authorisation for the Member States’ BITs that that originally proposed by the Commission. Thus, in the trilogue negotiations leading up to the conclusion of Regulation 1219/2012, the Council succeeded in gaining additional flexibility for the Member States insofar as the transitional arrangements are concerned. The flexibility is also reflected in the fact that the Regulation 1219/2012 enables Member States to continue expanding their networks of BITs even after the entry into force of the Treaty of Lisbon. This could considerably delay the EU reform taking effect, nonetheless, the Commission has been granted powers to continue implementing its strategy. Although the functional structure does not contain strong spillover pressures, it provides conditions for further integration in the area.

The authorisation for the Member States to continue expansion of their BIT programmes was a relatively uncontroversial, though important part of the trilogue negotiations.<sup>123</sup> In this regard, the Commission and the Council seemed to both appreciate that the development and implementation of the EU’s comprehensive policy on international investment may take some time. Thus, the transitional arrangements allow the Member States to continue expanding their networks of BITs into areas where there is no action by the EU, albeit require them to fulfil number of conditions.<sup>124</sup> Moreover, it was accepted that even if the investment competence is primarily exercised at the EU level, it is not the aim of the Commission to negotiate with all countries, which Member States

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<sup>119</sup> Proposal for Transitional Arrangements Regulation (n 114) Article 6.

<sup>120</sup> Council, ‘Council’s position at first reading with a view to the adoption of a Regulation of the European Parliament and the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries-Statement of the Council’s Reasons’ (2012) Interinstitutional File: 2010/0197 (COD) 11917/12 ADD 1, 6.

<sup>121</sup> Transitional Arrangements Regulation, Article 6(2).

<sup>122</sup> Transitional Arrangements Regulation, Article 6(3).

<sup>123</sup> Some aspects, like conditions for lack of authorisation were fine-tuned, but institutions agreed as to the main assumptions of this part of the Regulation. Transitional Arrangements Regulation, Chapter III.

<sup>124</sup> Ibid,

target for investment protection agreements, hence a degree of independent action by the Member States was permitted.<sup>125</sup>

Consequently, if after the entry into force of the Treaty of Lisbon 2009 a Member State wishes to conduct investment negotiations autonomously it must notify the Commission of such intentions in accordance with Article 8 of the Transitional Arrangements Regulation and keep the Commission informed on the progress of negotiations<sup>126</sup> and their final outcome.<sup>127</sup> An authorisation to initiate a Member State agreement may be withheld if proposed Member State agreement conflicts with EU law, it is superfluous because an EU agreement is underway, conflicts with the objectives of the EU external action in Chapter 1 Title V TEU, or constitutes a serious obstacle to the implementation of the EU policy.<sup>128</sup>

In addition to safeguarding a level of control for the Member States over their own investment policies, in the trilogue negotiations leading up to the Conclusion of Regulation 1219/2012 the Council also had to defend its own powers. The provision that would have undermined the Council's influence over the development of the EU's investment policy was, so called 'blackmail clause.'<sup>129</sup> It permitted the Commission to withhold an authorisation for a Member State BIT, if it overlapped with a proposed EU investment treaty for which the Council had not granted approval within a year.<sup>130</sup> The clause was intended to be the Commission's insurance policy in case that a future investment agreement it wished to initiate lacked a political approval of some Member States in the Council.<sup>131</sup> However, the legal vacuum that such a mechanism could have created, was exactly a situation the Member States wanted to avoid.<sup>132</sup> Moreover, such a solution would have raised serious doubts with respect to its compliance with the principle of institutional balance, undermining the Council's powers to open negotiations

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<sup>125</sup> Council, '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 – Outcome of the European Parliament's First Reading' Interinstitutional File 2010/0197 (COD) 9726/11, 2.

<sup>126</sup> Ibid, Article 10.

<sup>127</sup> Ibid, Article 11.

<sup>128</sup> Ibid, Article 9.

<sup>129</sup> Nikos Lavranos, 'New Development in the Interaction between International Investment Law and EU Law' (2010) 9 The Law and Practice of International Courts and Tribunals 409, 428.

<sup>130</sup> Transitional Arrangements Regulation (n 114) Article 6(d).

<sup>131</sup> Hoffmeister and Ünüvar (n 117) 81.

<sup>132</sup> Council, 'Position No 11/2012 at First Reading, with a View to the adoption of a Regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreement between Member States and Third Countries' (2012) C 352 E/23, 30.

of EU international agreements.<sup>133</sup> Even though the European Parliament offered its unconditional support on this matter to the Commission,<sup>134</sup> the Council's strong objections precluded the provision from featuring in the final version of the Regulation 1219/2012.

Although the main objective of Regulation 1219/2012 was to provide investors with confidence in the legal framework governing the investment protection in the internal market in the post-Lisbon era, the time it took to complete trilogue negotiations between the Council, the European Parliament and the Commission created in itself a degree of uncertainty.<sup>135</sup> The final version of the Regulation manages this issue, by establishing a separate system that applies to agreements concluded between the entry into force of the Regulation and the date of the Treaty of Lisbon 2009, which operates in a similar manner to the mechanism for conclusion of new treaties by the Member States.<sup>136</sup>

Notwithstanding the delay that the power play between the Council and the European Parliament in trilogue negotiations caused to the legislative process, the former has managed to significantly curb the Commission's power to decide on the fate of the pre-existing Member States BITs. The process of negotiating the Regulation 1219/2012 has demonstrated a strong bargaining powers of the Council vis-à-vis other institutions. This is potentially due to the Council's superior experience and expertise in the area of the CCP in comparison to the European Parliament. The outcome of the legislative trilogue can be regarded as a setback for the Commission that will delay its reform of the international investment system from taking effect. However, the compromise achieved in the negotiations has a positive impact on maintaining high level of certainty for foreign investors in Europe.

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<sup>133</sup> TEU, Article 13(2); TFEU, Article 218(2).

<sup>134</sup> European Parliament, 'Position, adopted at the first reading on 10 May 2011 with a view to the adoption of Regulation (EU) No .... /2011 of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries' (2011) (EP-PE\_TC1-COD(2010)197), Article 6(c).

<sup>135</sup> Council, '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 – Outcome of the European Parliament's First Reading' (2011) Interinstitutional File 2010/0197 9726/11, 3.

<sup>136</sup> Transitional Arrangements Regulation, Chapter IV.



### 5.5.2. Managing Financial Responsibility in Investor-State Arbitration

The Council also exerted a considerable bargaining power in the process leading up to the conclusion of Regulation 914/2014 on managing financial responsibility in investor-state claims, the second and, so far the last instrument in the legislative framework for the implementation of the EU investment policy adopted under Article 207(2) TFEU.<sup>137</sup> Unlike in negotiations on the Transitional Arrangements Regulation, the European Parliament and the Council were able to achieve a consensus at the first reading. However, this time the Parliament adopted a position that reflected interests of the Member States and because of that the Council was more willing to accept it. This dynamic further confirm the considerable bargaining power of the Council.

In the legislative negotiations the Council and the European Parliament were able to agree to limit the Commission's discretion with respect to the determination of financial responsibility and a respondent status in investor-state cases.<sup>138</sup> Both institutions supported amendments enabling them to better scrutinise Commission's actions and allowing Member States to retain greater control over the claims directed at them.<sup>139</sup> The aspect of the Parliament's legislative resolution that was certainly influenced by the Council was the amendment to narrow down the scope of the EU's powers. The Commission, in its proposal implied in a number of places that the EU had exclusive competence to conclude investment protection agreements<sup>140</sup> and the Parliament supported such interpretation before the CJEU.<sup>141</sup> However, in the trilogue, the Council insisted that the provisions of the Regulation accurately reflect the content of Article 207(1) TFEU and refer specifically to foreign direct investment when describing the EU's

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<sup>137</sup> Financial Responsibility Regulation.

<sup>138</sup> Council, 'Informal Note: Proposal for a Regulation of the European Parliament and the Council Establishing a Framework for Managing Financial Responsibility Linked to Investor-State Dispute Settlement Tribunals Established by International Agreements which the European Union is Party – Outcome of the European Parliament's First Reading' (2014) 8727/14.

<sup>139</sup> The Regulation covers three types of investment disputes: claims for which the Union is responsible, those for which the Member States take financial responsibility and claims for which both Union and Member States are liable. Financial Responsibility Regulation.

<sup>140</sup> For example: "With the entry into force of the Lisbon Treaty, the Union has acquired exclusive competence for the conclusion of international agreements on investment protection." Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party' [2012] COM(2012) 335 final (Commission's Proposal on Financial Responsibility in Investor-State Disputes), Recital 1.

<sup>141</sup> Opinion 2/15 (n 23).

powers, as oppose to a wider concept of international investment.<sup>142</sup> Despite initially supporting the Commission's proposal, the European Parliament eventually acquiesced to adopting the Council's amendments.<sup>143</sup> This demonstrates that in the light of the Council's experience as an actor in the process of integration, the Commission faces a difficult task in trying to create conditions for further integration.

In the same context, changes specifying that future EU investment agreements are to be concluded by both the EU and its Member States,<sup>144</sup> contrary to the Commission's initial intentions,<sup>145</sup> were introduced upon the Council's request.<sup>146</sup> Furthermore, in order to safeguard competences of the Member States, the final version of the Regulation contains a joint declaration of all three intuitions, pledging that the instrument has been concluded without prejudice to the division of competences and precluding its ERTA effect.<sup>147</sup> Although the amendment can be found in the Parliament's legislative resolution, it certainly is more consistent with the position of the Council and is indicative of the influence that the Council was able to exert upon the European Parliament during the trilogue negotiations.

The impact of the Council on the final shape of the Financial Responsibility Regulation is also visible in the amendments which aim was to ensure that the financial interests of the Member States are protected in disputes in which the Commission is responsible for the defence.<sup>148</sup> Moreover, in the final version of the Regulation the Commission's discretion to decide on a respondent has also been limited. Although it remains a possibility for the Union to be a party in a dispute arising out of treatment afforded by a Member State, the final version of the Regulation, at the request of the Council,<sup>149</sup> limits

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<sup>142</sup> Council, 'Proposal for a Regulation of the European Parliament and of the Council establishing a framework for managing responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party [First Reading] – Preparation for the informal trilogue' (2013) Interinstitutional File: 2012/0163 (COD) 144404/13 LIMITE (Council's Position for the Informal Trilogue), 4.

<sup>143</sup> Parliament (EU), "Position of the European Parliament establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party" [2014] EP-PE\_TC1-COD(2012)0163 (Position of the European Parliament on the Financial Responsibility Regulations), Recital 1.

<sup>144</sup> Ibid Article 1(1) and 2(a).

<sup>145</sup> Commission's Proposal on Financial Responsibility in Investor-State Disputes (n 139) Article 1(1) and 2(a).

<sup>146</sup> Council's Position for the Informal Trilogue (n 142) 20.

<sup>147</sup> Financial Responsibility Regulation, 134.

<sup>148</sup> Position of the European Parliament on the Financial Responsibility Regulations (n 143) Recital 12, Art 9(4).

<sup>149</sup> Council, 'Proposal for a Regulation of the European Parliament and of the Council establishing a framework for managing responsibility linked to investor-state dispute settlement tribunals established by

such an occurrence only to exceptional circumstances.<sup>150</sup> In line with the proposal, the Commission may represent interests of a Member State where both a Member State and the Union contributed to a breach of an investment treaty or a disputed treatment afforded by a Member State is a result of its obligations imposed by EU law.<sup>151</sup> However, contrary to the Commission's initial intent, it will no longer be able to take over as a respondent in claims, which could be faced by multiple Member States to protect their collective interests, or in disputes concerning unsettled points of law, that could have an impact upon future cases against either the Union or Member States.<sup>152</sup> The options for the Union to act on behalf of a Member States in the context of multiple claims have been limited to instances, where a similar treatment is challenged at the WTO.<sup>153</sup>

The Member States, however, can ask the Commission to step in as a respondent if they feel that the institution has superior expertise to deal with a particular legal issue.<sup>154</sup> The changes introduced allow the Member States to retain control over dispute lodged against them, which is desirable given the fact that some of the investor-state disputes may consider points of domestic law and in the light of much greater experience of the Member States in investor-State arbitration.

The amendments to the Commission's proposal implemented by the Council and the European Parliament also curbed the Commission's powers with respect to settlements between investors and states. In the draft proposal, the Commission had granted itself the authority to make final decisions whether to settle a dispute, even in instances, where a claim partly concerned a treatment afforded by a Member State.<sup>155</sup> This arrangement has undergone a significant transformation in the final version of the Regulation 912/2014, which no longer permits the Commission to settle without a Member State's consent, where such a decision would result in the latter incurring financial liability.<sup>156</sup> This is

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international agreements to which the European Union is party [First Reading] – Preparation for the informal trilogue' (2013) EU) Interinstitutional File: 2012/0163 (COD), 144404/13 LIMITE, 7.

<sup>150</sup> Financial Responsibility Regulation, Recital 11; Commission's Proposal on Financial Responsibility in Investor-State Disputes (n 139) Recital 11.

<sup>151</sup> Financial Responsibility Regulation, Recital 11, Article 9(2).

<sup>152</sup> Commission's Proposal on Financial Responsibility in Investor-State Disputes (n 139) Recital 11 and 12, Article 8(c) and Article 8 (d).

<sup>153</sup> Financial Responsibility Regulation, Recital 11, Article 9(3).

<sup>154</sup> Ibid.

<sup>155</sup> Commission's Proposal on Financial Responsibility in Investor-State Disputes (n 139) Article 13.

<sup>156</sup> Financial Responsibility Regulation, Article 14.

another example of the Council's efforts to increase the control of the Member States over the development of the EU's international investment policy.

### **5.5.3. The Summary of the Council's Legislative Action**

The legislative interaction between the institutions concerning the framework for implementation of the EU's international investment policy demonstrated that the Council enjoys a considerable bargaining power. In the context of both Regulations, the Council's aim was to ensure that the Commission does not have an unlimited discretion to decide on the fate BIT networks concluded prior to the Treaty of Lisbon 2009 and that the Member States retain a high degree of independence in disputes, which do not have their basis in EU law or arise out of the actions of EU institutions. Thus, the objective of the amendments proposed by the Council was to maintain the highest possible level of Member States' control over the development of the EU's international investment policy. This is consistent with the aims pursued through interinstitutional 'turf wars' outlined in the preceding section. However, with regards to legislative negotiations the Council enjoyed significantly more success than in litigation.

In this context, although the European Parliament has tried to assert a strong position in the trilogues preceding the conclusion of the Regulation on transitional arrangements, which led to the second reading, the Council was able to defend its stance and pass all amendments that were important to the Member States. Notwithstanding, the fact that in majority of cases the Council appeared to have acted as an agent of the Member States, in some situations it was also forced to defend its institutional prerogatives. This was particularly visible in relation to the efforts of the Commission to introduce the 'blackmail' clause in the Regulation 1219/2012, which was categorically rejected by the Council. These interactions highlight the second nature of the Council as supranational institution and an actor in the process of EU integration that consistently with the assumptions of the neofunctionalism is interested in safeguarding and furthering its own powers.

The interinstitutional dynamic has been a force that has shaped the development of the EU's international investment policy. Although the Commission, supported in the trilogues by the European Parliament had tried to cultivate pro-integrative pressures, they were not able to achieve the optimal functional structure for further transfer of competences in the sphere of investment due to strong countervailing forces originating

from the Council. Nonetheless, as the Union's action in the field continues, the supranational institutions have further opportunities to foster spillover.

## **5.6. Conclusions**

In the neofunctionalist framework the Council, as evaluated in this chapter can be considered as the major source of countervailing forces. The interinstitutional litigation that was instigated by the Council after the entry into force of the Treaty of Lisbon 2009 is indicative of a strong dissatisfaction of the Member States with the increasing supranational character of the EU foreign relations. The opposition of the Member States against the expanding scope of the Union's exclusive competences and the new procedure for conclusion of international treaties can be regarded as efforts to protect status of the Member States as autonomous actors on the international scene. This sovereignty consciousness, considered in the neofunctionalist framework as the strongest of the countervailing forces, could negatively impact upon future integration in the CCP, by causing either standstill, or even a spillback in the process.

The Council has made a significant contribution to the development of the legislative framework for implementation of the common investment policy. In this context, the institution demonstrated strong bargaining power in the new trilogue configuration. The institution was able to curb the Commission's discretion over the existing networks of BITs and secure flexibility for the Member States to continue independent action in the field. Although in the short-term this facilitates maintaining investors' confidence through guaranteeing stability of the legislative framework, it also delays the Commission's reforms from taking an effect.

In the overall assessment, the Council with its actions have systematically undermined the efforts of the Commission and the European Parliament to move the process of integration in the CCP forward. The countervailing forces stemming from the Council with respect to foreign relations seem relatively strong in the post-Lisbon era, implying little appetite from the Member States for further transfer of competences to the Union.

## **Chapter 6.**

# **The Role of the Court of Justice of the European Union in the Development of the EU Policy on International Investment and in the Process of Integration in the CCP**

### **6.1. Introduction**

In the revised neofunctionalist framework the Court of Justice of the European Union (CJEU) has been recognised as one of the main actors in the process of EU integration. In the foundational period the case law of the Court established essential constitutional doctrines, which ensured continuing success of the European project. Thus, from a general perspective the Court has traditionally been considered as a positive force in the process of integration. The CJEU enjoys broad discretion, which puts it in an important position insofar as the development of the EU's international investment policy and future of integration in the CCP are concerned.

However, the Court has demonstrated a high level of distrust with respect to external courts and tribunals. The CJEU's Opinion that investor-state dispute resolution mechanism is incompatible with EU law would be a major setback for the Commission in its efforts to establish itself as a credible actor in the sphere of investment. Consequently, it is proposed in the analysis below that in the development of the EU investment policy the CJEU should be considered as a source of strong countervailing forces, which could have a spillback effect on the Member States decision to transfer of loyalties to the supranational centre with respect to international investment

Against this background, this chapter evaluates, from the neofunctionalist perspective, impact of the Court on the EU's investment policy and future integration in the CCP.

### **6.2. The CJEU in the Neofunctionalist Framework**

The Court's role in the process of integration has evolved with time. Although this is similar to the role of the European Parliament, the Court was able to establish a powerful position much quicker due to the considerable discretion enjoyed by the institution, which allows it to impact on the rules of the game. Thus, during so called 'foundational period'<sup>1</sup>

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<sup>1</sup> Joseph Weiler, 'The Transformation of Europe' (1990-1991) 100 Yale L.J. 2403, 2410.

the CJEU established doctrines which added a new functional domain to the EU integration that ensured continuity of the process in spite of political contestation.

The constitutional doctrines laid down by the CJEU in the foundational period provided conditions for deepening of the relationship between the Member States. The incremental constitutionalization of the Treaty of Rome 1958 started with the CJEU's famous pronouncement of the EU as a 'new legal order' in *Van Gend & Loos*.<sup>2</sup> The doctrine of direct effect, established therein, became a decentralised mechanism for enforcement of EU law, effectiveness of which was ensured by the doctrine of supremacy which followed soon after.<sup>3</sup> The impact of these core doctrines upon the process of integration was further enhanced by the doctrine of implied powers, which allowed the EU's competences to dynamically evolve.<sup>4</sup> All of these mechanism have been judicial creations, which make the role of the Court as an actor in the process of integration unquestionable.

The early jurisprudence of the CJEU was a catalyst for further development of constitutional principles of the EU legal order, which created conditions for the EU to expand its powers into virtually all spheres of law making, consistently with the neofunctionalist assumption of spillover<sup>5</sup>. The CJEU's judgments were capable of strengthening the interdependence among the Member States even in the times of crisis.<sup>6</sup> In the language of the neofunctionalists, the law provided a 'mask of technical discourse',<sup>7</sup> which allowed the Member States to move forward on the path of integration despite political bargaining and contestation.<sup>8</sup> The picture of the EU as a constitutional polity and the CJEU as its constitutional court was completed by the establishment of the system for effective protection of human rights in the Charter of Fundamental Rights of the European Union, which became binding with the entry into force of the Treaty of

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<sup>2</sup> Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 00095.

<sup>3</sup> Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 00585; Joseph Weiler (n 1), 2415.

<sup>4</sup> Case 22/70, *Commission of the European Communities v Council of the European Communities (European Agreement on Road Transport, ERTA)* [1971] ECR 263; Joseph Weiler (n 1), 2415-2416.

<sup>5</sup> Arne Niemann, *Explaining Decisions in the European Union* (CUP 2006) 144.

<sup>6</sup> Some of the most important constitutional doctrines were developed during the time of the 'Empty Chair Crisis'; Loïc Azoulay and Renaud Dehousse, 'The European Court of Justice and the Legal Dynamic of Integration' in Erik Jones, Anand Menon and Stephen Weatherill (eds), *The European Union* (OUP 2012), 359.

<sup>7</sup> Walter Mattli and Anne-Marie Slaughter, 'Revisiting the European Court of Justice' (1998) 52 *Journal of International Organization* 177, 181.

<sup>8</sup> Gráinne De Búrca, 'Rethinking Law in Neofunctionalist Theory' (2005) 12 *Journal of European Public Policy* 310, 312.

Lisbon 2009.<sup>9</sup> In Opinion 2/13 the CJEU emphasised the importance of EU law for the process of integration with the following statement: ‘essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a “process of creating an ever closer union among the peoples of Europe.”’<sup>10</sup>

The CJEU is a unique type of a constitutional court in accordance with the assumptions of the neofunctionalist theory of integration. In this context, the Court has not only been tasked with enforcing the rule of law, but has also been delegated a fiduciary responsibility to further the process of integration, which explains the reasons behind establishing all of the constitutional doctrines.<sup>11</sup> The contribution of the CJEU to the process of EU integration has been undisputed in the literature.<sup>12</sup> Describing the attitude of the CJEU towards national laws of the Member States, Mancini and Keeling suggested that the Court had a special preference for Europe in its genetic code.<sup>13</sup> The Court itself embraces its role reminding frequently and in a constitutional fashion that the *raison d’être* of the EU is to create ‘an ever closer union among the peoples of Europe’.<sup>14</sup> The constitutionalisation of the Treaty has been possible due to a broad discretion afforded to the Court by the Member States, which makes it a powerful actor in the EU’s integration, competent to establish not only parameters within which the process occurs, but also to expand or limit the scope of its own powers.<sup>15</sup>

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<sup>9</sup> Charter of Fundamental Rights of the European Union [2000] OJ C364/1; Although at the time Weiler wrote his seminal article ‘The Transformation of Europe’ an EU ‘Bill of Rights’ did not exist, he, nonetheless, observed that the development of human rights jurisprudence was important for the self-image of the CJEU as a constitutional court. Joseph Weiler (n 1), 2417.

<sup>10</sup> Opinion 2/13 *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [2014] OJ C 65/2 (Opinion 2/13), para 167.

<sup>11</sup> Alec Stone-Sweet, *The Judicial Construction of Europe* (OUP 2004), 27-30; Wayne Sandholtz and Alec Stone Sweet, ‘Neo-Functionalism and Supranational Governance’ in Erik Jones, Anand Menon and Stephen Weatherill (eds), *The Oxford Handbook of the European Union* (OUP 2012), 22-23.

<sup>12</sup> Examples of the literature on this subject include: Alec Stone-Sweet (n 11); Eric Stein, ‘Lawyers, Judges and the Making of a Transnational Constitution’ (1981) 75 Am.J.Int’l L. 1; Anne-Marie Burley and Walter Mattli, ‘Europe Before the Court: A Political Theory of Legal Integration’ (1993) 47 International Organization 42; Giuseppe F. Mancini, *Democracy and Constitutionalism in the European Union: Collected Essays*, (Hart Publishing 2000); Miguel Poiarses Maduro, *We the Court: The European Court of Justice and the European Economic Constitution. A Critical Reading of Article 30 of the EC Treaty* (Hart Publishing 1998); Hjalte Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking*, (Martinus Nijhoff Publishers 1986).

<sup>13</sup> Giuseppe F Mancini and David T Keeling, ‘Democracy and the Court of Justice’ (1994) 57 The Modern Law Review 175, 186.

<sup>14</sup> Opinion 2/13 (n 10), para 172;

<sup>15</sup> Sandholtz and Stone-Sweet (n 25), 22-23.



In addition to furthering the process of EU integration, the Court also protects its own creation. As the constitutional doctrines are preconditions for the interdependence between the Member States the CJEU considers their effective operation as essential for the purpose of maintaining integrity of the EU legal order.<sup>16</sup> This attitude has shaped not only the relationship between the EU and its Member States, but also that of EU law and international law and, consequently, interaction of the CJEU with other external judicial bodies.

This chapter evaluates the attitude of the CJEU towards external courts and tribunals from the perspective of the neofunctionalist theory of integration. The theoretical assumptions of neofunctionalism depict the Court as a trustee exercising fiduciary responsibilities to further the process of integration. Through analysing the unique role that the law has played in the process of integration, this chapter explains why the CJEU adopts a cautious approach towards external courts and tribunals and, further, how the position of the CJEU towards international law and its enforcement organs could potentially limit the future development of the EU's investment policy.

### **6.3. The Dispute Resolution System in the EU's Future Investment Agreements**

BITs have been traditionally enforced in investor-state arbitration.<sup>17</sup> An effective dispute resolution mechanism accessible directly to investors has been considered an important guarantee of investment protection standards. One of the main characteristic of the system, has been its independence from the existing court structures of states.<sup>18</sup> This specific feature, has allowed to depoliticise investment claims, thus guarantee their objective resolution.<sup>19</sup> However, in recent years the system has been subjected to increased scrutiny by the civil society and has been losing public support.<sup>20</sup>

Since the inception of the EU international investment policy, the Commission expressed a strong preference for including a dispute settlement mechanism that would ensure the

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<sup>16</sup> Opinion 2/13 (n 10), paras 166,167.

<sup>17</sup> Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2<sup>nd</sup> edn, OUP 2014) 237.

<sup>18</sup> Ibid ch X, 235.

<sup>19</sup> Christopher F Dugan, Don Wallace Jr, Noah D Ribins and others, *Investor-State Arbitration* (OUP 2008) 13-18.

<sup>20</sup> Case T-754/14 *Efler and Others v Commission* [2017] OJ C34/39.

effectiveness of the EU's investment agreements.<sup>21</sup> Although initially the Commission had supported investor-states arbitration,<sup>22</sup> as the opposition towards it intensified an alternative solution has been implemented in the EU investment agreements.<sup>23</sup> In CETA, the Commission has initiated a two-stage reform. The agreement currently provides for an institutionalised court system.<sup>24</sup> Some of its new features, as evaluated in Chapter 3, include a possibility to appeal a decision of a tribunal and removal of a right of parties to appoint arbitrators. This mechanism is, however, implemented on a bilateral basis and the second stage in the Commission's reform is to establish a Multilateral Investment Court.<sup>25</sup> Although these innovation differ from investor-state arbitration, the common feature that all of these mechanism share is their independence from the jurisdiction of host states' courts in resolving investment disputes.

However, an independent nature of investment courts or tribunals may pose certain challenges from the perspective of their compatibility with EU law and create tensions with the jurisdiction of the CJEU. Although the CJEU does not *prima facie* reject jurisdiction of external courts and tribunals,<sup>26</sup> it has demonstrated a defensive attitude towards them. The reluctance of the CJEU to recognise other international courts as compatible with EU law is manifested in its jurisprudence. Article 218(11) TFEU gives the Court power to prevent an international agreement negotiated by the EU from entering into force, if it is found to be incompatible with EU law. In many Opinions rendered to date, in which a direct question of compatibility of an external court with EU law arose, the CJEU gave negative answers. This poses a significant threat to the future of the common investment policy.

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<sup>21</sup> Commission, 'Towards a comprehensive European International Investment Policy' (Communication) COM (2010) 343 final 9-10.

<sup>22</sup> Ibid 10.

<sup>23</sup> Commission, 'Recommendation for a COUNCIL DECISION authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes' COM/2017/0493 final.

<sup>24</sup> Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part and the European Union on and its Member States, of the other part (CETA) (signed 30 October 2018) [2017] OJ L11/23, Chapter Eight.

<sup>25</sup> Commission, 'Investment in TTIP and Beyond- the Path for Reform: Enhancing the Right to Regulate and Moving from Current Ad Hoc Arbitration Towards Investment Court (Concept Paper)'.

<sup>26</sup> Opinion 1/91 *Agreement on the European Economic Area* [1991] ECR 6099 (Opinion 1/91), para 40.

#### 6.4. The CJEU's Attitude towards International Courts

The reason behind the CJEU's attitude of distrust towards external courts and tribunals can be better understood upon a closer examination of the impact that law has on the process of EU integration. As outlined in the first part of this chapter, law provides another dimension through which interdependence between the Member States is ensured, hence proper functioning of the constitutional doctrines is considered essential for the purpose of maintaining integrity of the EU legal order. Thus, with regards to interaction of the Union with the outside world the Court put itself in a position of the ultimate guardian of the autonomy of EU law.

In the light of the importance of its task, the CJEU adopted a protectionist attitude and approaches any norms that try to permeate the EU legal order with suspicion. This was manifested in *Kadi and Al Barakaat*,<sup>27</sup> a case which has been considered to reveal the 'external dimension of European constitutionalism.'<sup>28</sup> Therein, the CJEU asserted the primacy of its constitutional norms, through invalidating measures prescribed by the UN Security Council as incompatible with the EU's system for protection of human rights.<sup>29</sup> Although, the CJEU's tendency towards emphasising separateness of the EU constitutional order from international law has been apparent since *Van Gend & Loos*,<sup>30</sup> the judgment in *Kadi* has been received as a clear declaration of the CJEU's readiness to protect EU law from all international law intrusions posing any threat to its autonomy.<sup>31</sup>

However, the CJEU does not completely reject norms of international law. Its early case law clarified that when the EU signs an international agreement, its provisions become an integral part of EU law binding upon the EU, its institutions and Member States.<sup>32</sup> Nonetheless in its interaction with international law the Court adopts a strongly pluralistic approach,<sup>33</sup> and prioritises 'domestic constitutionalism' over 'international

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<sup>27</sup> Case C-402/05 *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-06351.

<sup>28</sup> Daniel Halberstam, 'Local, Global, and Plural Constitutionalism: Europe Meets the World' in Gráinne De Búrca and Joseph Weiler, *The Worlds of European Constitutionalism* (CUP 2012), 187.

<sup>29</sup> Ibid 176; Case C-402/05 *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* (n 27).

<sup>30</sup> Franz C Mayer, 'Van Gend en Loos: The Foundation of a Community of Law' in Miguel Póiares Maduro and Loïc Azoulai (eds) *The Past and Future of EU Law. The Classics of EU law Revisited on the 50<sup>th</sup> Anniversary of the Rome Treaty* (Hart Publishing, 2010), 20.

<sup>31</sup> Daniel Halberstam (n 28) 188.

<sup>32</sup> Case 181/73 *Haegeman* [1974] ECR 450, para 5; Opinion 1/91 (n 26), para 37.

<sup>33</sup> This opinion is adopted by number of commentators: Daniel Halberstam (n 28); Gráinne De Búrca, 'The European Court of Justice and the International Legal Order after Kadi' (2010) 51 Harv Int'l LJ 1; Katja Ziegler, 'International law and EU law: between Asymmetric Constitutionalisation and Fragmentation' in

constitutionalism’,<sup>34</sup> eschewing involvement in a dialogue with other international judicial authorities.<sup>35</sup> Ziegler considers that this approach, although poses certain risks from the perspective of the international legal order, by reducing its coherence and enhancing fragmentation, can be explained by the EU trying to assert its identity *vis-à-vis* Member States.<sup>36</sup> Analysing the stance taken by the CJEU from the perspective of the neofunctionalist theory, this chapter proposes, somewhat in a similar vein, that the Court’s attitude towards international law is a result of its fiduciary responsibilities to further and protect the integration among the Member States and also reflects a self-interested nature of actors engaged in the process of integration.

As a direct consequence of this autonomy-driven approach, international law norms are allowed to permeate the EU legal order only within narrowly defined parameters that ensure their compatibility with core principles of EU law. In the opinion of the Court, strict criteria for governing the EU’s interaction with international law are essential for the purpose of maintaining the integrity of the EU legal order.<sup>37</sup> The Court is particularly protective of its own powers,<sup>38</sup> which guarantee proper operation of the EU constitutional doctrines, thus are essential for safeguarding the autonomy of the Union.<sup>39</sup> The powers of the Court<sup>40</sup> encompass provision of binding decisions concerning interpretation of EU law,<sup>41</sup> resolution of disputes between two member states arising pursuant to EU law,<sup>42</sup>

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Alexander Orakhelashvili, *Research Handbook on the Theory and History of International Law* (Edward Elgar, Cheltenham, 2011), 268.

<sup>34</sup> Katja Ziegler (n 33) 272.

<sup>35</sup> Gráinne De Búrca, (n 29) 41, 44.

<sup>36</sup> Katja Ziegler (n 29) 272.

<sup>37</sup> Opinion 2/13 (n 10), para. 174; Opinion 1/09 *Creation of a Unified Patent Litigation System* (Opinion 1/09) [2011] ECR I-01137, para 65.

<sup>38</sup> The CJEU’s protectionist attitude was also noticed by number of commentators, e.g.: Marise Cremona, ‘A Reticent Court? Policy Objectives and the Court of Justice’ in Marise Cremona, Anne Thies (eds.) *Modern Studies in European Law, Volume 49: European Court of Justice and External Relations Law: Constitutional Challenges* (Bloomsbury Publishing 2014), 29; August Reinisch, ‘The EU on the Investment Path – *Quo Vadis* Europe? The Future of EU BITs and other Investment Agreements’ (2013-2014) 12 Santa Clara J. Int’l L. 111, 152; Stephan E. Schill, ‘Luxembourg Limits: Conditions for Investor-State Dispute Settlement under Future EU Investment Agreements’ in Marc Bungenberg, August Reinisch, Christian Tietje (eds.) *EU and Investment Agreements* (Nomos, Baden-Baden, Germany, 2013), 37-54.

<sup>39</sup> Opinion 2/13 (n 10), para. 183; Opinion 1/00 *Proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area* [2002] ECR I-03493, para 21; Opinion 1/09 (n 37), paras 66,67; Case C-402/05 *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* (n 27), para 282.

<sup>40</sup> Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 (TFEU), Art 19 TEU and Arts. 263, 265, 269, 268, 258, 259, 260, 267, 344.

<sup>41</sup> *Ibid* Art. 267.

<sup>42</sup> *Ibid* Art. 344.

and deciding on the legality of actions of the Member States<sup>43</sup> and EU institutions.<sup>44</sup> The jurisdiction of the CJEU, as defined in the Treaty, affects the interaction of the EU legal order with external courts and tribunals. As the CJEU prioritises the internal constitutional integrity, the external dispute resolution mechanisms have to comply with a complex set of conditions, which evolved in the CJEU's jurisprudence. The purpose of this legal framework is to ensure that the jurisdiction of any external body does not undermine functions of the CJEU as the final arbiter on matters of EU law.

Nonetheless, the CJEU accepts that in principle the EU is competent to accede to a jurisdiction of an international court and accepts that decisions of an external judicial body, in such an instance, would be binding upon all EU institutions, including the Court.<sup>45</sup> However, to date it has proven to be rather difficult to satisfy the CJEU's conditions for compatibility, which raises doubts about the practical applicability of the abovementioned principle. The CJEU frequently quotes three main objections to jurisdiction of external court, as grounds for their incompatibility with EU law. Firstly often in cases of mixed agreements, the Court found that powers of an external judicial body to decide upon a respondent are incompatible with the CJEU's duty to rule on the divisions of competence between the EU and the Member States.<sup>46</sup> Secondly, in some instances the Court found a violation of Article 344 TFEU, which grants the CJEU an exclusive jurisdiction to adjudicate in disputes between the Member States concerning matters within the scope of EU law.<sup>47</sup> Finally, in several circumstances it was held that an external court undermined the CJEU's authority to provide final and binding interpretation of EU law.<sup>48</sup>

## **6.5. The Compatibility of Investor-State Dispute Resolution Mechanism with EU Law**

The above mentioned objections to the jurisdiction of external courts and tribunals are examined in detail in this section in the context of investor-state dispute resolution mechanism in the EU's investment agreement. Since this chapter seeks to explain the position of the Court in the development of the EU's international investment policy from

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<sup>43</sup> Ibid Arts. 258, 259, 260.

<sup>44</sup> Ibid Arts. 263, 265, 269, 268.

<sup>45</sup> Opinion 1/91 (n 26), para. 39; Opinion 1/09 (n 37), para. 74; Opinion 2/13 (n 10), para 182.

<sup>46</sup> Opinion 1/91 (n 26); Opinion 2/13 (n 10).

<sup>47</sup> Case C-459/03 *Mox Plant* [2006] ECR I-04635; Opinion 2/13 (n 10),

<sup>48</sup> Opinion 1/91 (n 26); Opinion 1/09 (n 37); Opinion 2/13 (n 10), paras. 197-199, 237-248.

the perspective of the neofunctionalist theory of integration, the main assumption adopted for the purpose of this analysis is that the CJEU is not only an ordinary constitutional court, but also an agent in the process of integration. As the law in the EU provides conditions for continued existence and deepening of the interdependence between the Member States, the Court considers that safeguarding its powers is essential for maintaining the integrity of the EU legal order. Consequently, the analysis in the next part will be concerned only with the extent of the jurisdictional conflict that could arise between the CJEU and investment tribunals. The main question addressed is whether jurisdictions of an investment tribunal and Multilateral Investment Court affect essential characteristics of the powers of the CJEU in a manner that could threaten the integrity of the EU legal order, rendering all investor-state tribunals incompatible with EU law.

### **6.5.1. The Division of Competences and Article 344 TFEU**

The first “essential function” of the CJEU, evaluated in this section, which must not be undermined by a jurisdiction of an external tribunal, is the power to rule on the division of competences between the EU and its Member States<sup>49</sup>. As indicated in the Opinion 1/91 this could occur if an international judicial body is allowed to determine whether the Union or its Member States should be parties to a dispute arising pursuant to an international agreement.<sup>50</sup> This could be a valid concern in the context of investment agreements, as claims under them will be directed either to the Union or an individual Member State. However, the drafting of the EU’s international investment agreements seeks to alleviate such a threat through internalising the question of responsibility in investor-state disputes brought by third country investors. In all agreements negotiated to date, power to determine a respondent is vested in the EU<sup>51</sup> and is to be exercised in accordance with EU Regulation 912/2014 on managing financial responsibility linked to investor-state disputes.<sup>52</sup>

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<sup>49</sup> TFEU Art. 263.

<sup>50</sup> Opinion 1/91, (n 26) paras. 33-36.

<sup>51</sup> CETA (n 24), Art 8.21; EU-Vietnam Free Trade Agreement: Agreed Text as of January 2016 (EU-Vietnam FTA), Art 6 <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>> accessed 8 January 2018; EU-Singapore Free Trade Agreement. Authentic Text as of May 2015 (EU-Singapore FTA), Art 9.15 <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>> accessed 15 September 2017.

<sup>52</sup> Regulation 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party [2014] OJ L257/121 (Financial Responsibility Regulation).

Although it has been suggested that this solution is sufficient,<sup>53</sup> a potential incompatibility could arise out of the need to balance interests of the EU with legal certainty guaranteed to investors. Provisions, for example, in CETA and EU-Singapore FTA, allow the EU a period of fifty and sixty days respectively for making a determination of a respondent.<sup>54</sup> In the absence of a decision, the treaties permit an investor to direct his claim to either the EU or a Member State, depending on the source of treatment which allegedly breached an investment protection standard.<sup>55</sup> It is further expressly guaranteed in CETA that a determination undertaken by an investor will be binding upon the investor-State tribunal.<sup>56</sup> This type of clauses may, nonetheless, be accepted by the CJEU, as it is the Commission's obligation arising out of aforementioned Regulation 912/2014 to make its determination within a period of forty-five days,<sup>57</sup> which could be considered as an adequate safeguard for ensuring that an investor is never required to exercise its right to decide upon a respondent. This conclusion, however, has to be taken with caution in the light of the protectionist attitude of the CJEU highlighted in the preceding section.

Furthermore, the second concern about compatibility of EU's investment agreements with EU law that has been frequently mentioned in the literature relates to the CJEU's exclusive jurisdiction in Article 344 TFEU to settle disputes between Member States concerning interpretation of EU law.<sup>58</sup> This essential character of the CJEU's powers has been affirmed in the *MOX Plant* case,<sup>59</sup> in which the CJEU found that Ireland violated its obligations under EU law, by bringing a dispute against another Member States in an area of EU's competence, before an international tribunal.<sup>60</sup> Although the EU's international investment treaties will be concluded as mixed agreements, it is not intended for them to produce legal effects between the EU and its Member States, or between the Member States. Moreover, in Opinion 1/09 the CJEU has stated that the jurisdiction of the patents

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<sup>53</sup> Angelos Dimopoulos, 'The Involvement of the EU in Investor-State Dispute Settlement: A Question of Responsibilities' (2014) 51 CML Rev 1671.

<sup>54</sup> CETA (n 24) Art. 8.21, EU-Singapore FTA (n 51), Art. 9.15.

<sup>55</sup> Ibid.

<sup>56</sup> CETA, (n 24), Ch 8 Art. 8.21(7).

<sup>57</sup> Financial Responsibility Regulation, Art. 9.

<sup>58</sup> Marcus Burgstaller, 'Investor-State Arbitration in EU International Investment Agreements with Third States' (2012) 39(2) Legal Issues of Economic Integration 207; Nikolaos Lavranos, 'Mox Plant and Ijzeren Rijn Disputes: Which Court Is the Supreme Arbitrator?' (2006) 19 Leiden Journal of International Law 223; Stephan E. Schill (n 348, 44; Angelos Dimopoulos, 'The Validity and Applicability of International Investment Agreements between EU Member States under EU and International Law' (2011) 48 CML Rev. 63, 85-86; August Reinisch, 'The EU on the investment Path- *Quo Vadis* Europe? The Future of EU BITs and Other Investment Agreements' (2013-2014) 12 Santa Clara J. Int'l L. 111, 152-153.

<sup>59</sup> Case C-459/03 *Mox Plant* May 2006 ECR I-04635.

<sup>60</sup> Ibid.

court was not in conflict with the powers of the Court under Article 344 TFEU, as it was concerned with resolution of disputes between private parties.<sup>61</sup> Arbitral tribunal, established under EU investment agreements will be granted powers to hear disputes between private party investors and States. Thus, in line with the CJEU's previous jurisprudence they will not undermine the Court's powers in Article 344 to rule on matters of EU law in disputes between Member States.<sup>62</sup>

### **6.5.2. The CJEU's Exclusive Power to Interpret EU Law**

In relation to the last objection to the jurisdiction of external courts outlined in the preceding part, the CJEU has been known to vigilantly safeguard its own powers to provide final and binding interpretation of EU law. Several external judicial bodies have been rejected as incompatible with EU law, on the ground that they undermined the CJEU's position as the final arbiter on matters of EU law.<sup>63</sup> In the light of the constitutional significance of its own powers, the Court thoroughly scrutinises international agreements which propose to establish external courts, and errs on the side of caution when assessing their jurisdictional compatibility with EU law.<sup>64</sup> Case law in this area reveals that the adverse effect upon the CJEU's jurisdiction could arise not only from provisions expressly granting an international court powers to interpret EU law, but also be an unintended consequence of specific characteristics of a particular agreement.<sup>65</sup> This gives the Court wide discretion and raises uncertainty about the future of the EU investment policy. In this regard, the Commission has proven to be responsive to the criteria set by the CJEU and in its proposal of the new dispute resolution system under EU investment agreements incorporated clauses aimed at ensuring their compatibility with Court's case law. These provisions have been evaluated in the subsequent section.

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<sup>61</sup> Opinion 1/09 (n 37), para 63.

<sup>62</sup> Others expressed similar views, see: Eirik Bjorge, 'EU law Constraints on Intra-EU Investment Arbitration?' (2017) 16 *The Law and Practice of International Courts and Tribunals* 71.

<sup>63</sup> Opinion 1/91 (n 26), paras. 42-46; Opinion 1/09 (n 37) para. 89.

<sup>64</sup> There appears to be a consensus in the literature that the CJEU is cautious, defensive and protectionist of its legal space in its interaction with external courts and tribunals, for example: Marise Cremona (n 34), 29; August Reinisch (n 58), 150; Nikos Lavranos, 'Is an International Investor-State Arbitration System Possible under Auspices of the ECJ?' in N. Jansen Calamita, David Earnest and Markus Burgstaller (eds) *The Future of ICSID and the Place of Investment Treaties in International Law: Investment Treaty Law Current Issues IV*, (The British Institute of International and Comparative Law, 2013), 147.

<sup>65</sup> Opinion 1/91 (n 26); Opinion 2/13 (n 20); Cf: Opinion 1/09 (n 37). In this Opinion the CJEU considered an agreement creating The European and Community Patents Court, which was expressly granted a jurisdiction to interpret EU Regulations on intellectual property.



Though, it has been questioned whether the current solution is sufficient to ensure positive Opinion of the Court.

The latter type of incompatibility, resulting out of special characteristics of an international agreement, was found by the CJEU in relation to the European Economic Area (EEA) Agreement. Although the EEA Court, examined by the CJEU in the Opinion 1/91, did not formally assert the power to interpret EU law, it was granted jurisdiction over provisions of the EEA Agreement, which were worded identically as the EEC Treaty in force at the time.<sup>66</sup> The overall objective of the EEA court was to ensure uniform application of the provision of the EEA Agreement throughout the territory of the contracting parties, which included EU and its Member States. In the light of this objective the jurisdiction of the EEA court, combined with a lack of a mechanism ensuring that the CJEU can provide binding interpretation of corresponding provision of the EEC Treaty, was considered to encroach upon the powers of the EU Court to provide final and binding interpretation on matters of EU law.<sup>67</sup> EU investment treaties, similarly to the EEA agreement, do not expressly grant jurisdiction to investment tribunals to interpret EU law, nonetheless they contain clauses, which are worded similarly to provisions of EU Treaties, which has been considered in the subsequent paragraphs in this section.<sup>68</sup>

Although, on the one hand, the CJEU was considered to be ‘unduly rigid’ towards creation of the EEA Court,<sup>69</sup> on the other hand, it pronounced that, as a general principle, an external dispute resolution system created for the purpose of enforcing an international agreement the EU enters into was compatible with EU law.<sup>70</sup> Thus, it seemed that the objections of the CJEU in the Opinion 1/91 were mainly directed towards creation of a quasi-EU jurisdiction by an agreement which objective was to extend an application of the *acquis communautaire* to third countries.<sup>71</sup> The CJEU highlighted that the EEA Agreement ‘took over’ fundamental aspects of the EU legal order, and permitted an

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<sup>66</sup> Opinion 1/91 (n 26), paras 41-42.

<sup>67</sup> Opinion 1/91 (n 26), paras 43-46.

<sup>68</sup> August Reinisch, ‘Articles 30 and 59 of the Vienna Convention on the Law of Treaties in Action: The Decisions on Jurisdiction in the *Eastern Sugar* and *Eureko* Investment Arbitrations’ (2012) 39(2) Legal Issues of Economic Integration 157.

<sup>69</sup> Bruno De Witte, ‘A Selfish Court? The Court of Justice and the Design of International Dispute Settlement Beyond the European Union’ in Marise Cremona, Anne Thies (eds.) *Modern Studies in European Law, Volume 49: European Court of Justice and External Relations Law: Constitutional Challenges* (Bloomsbury Publishing 2014), 38.

<sup>70</sup> Opinion 1/91 (n 26) para. 39-40.

<sup>71</sup> Bruno De Witte (n 69) 37.

external court to enjoy jurisdiction over their interpretation, which was not acceptable from the perspective of autonomy of EU law.<sup>72</sup> In the light of these specific characteristics of the EEA Agreement, the Opinion 1/91 created an impression that there might be some scope for flexibility in the CJEU's emerging framework for interaction with external judicial bodies and was read to imply that as long as an external court did not affect the interpretation of core provisions of EU law, its jurisdiction would have been accepted by the CJEU.<sup>73</sup>

However, as the case law of the CJEU evolved hopes for flexibility began to disappear. In the cases that followed the Opinion 1/91, the CJEU's constitutional narrative of guarding autonomy of the EU legal order became more elaborate and the conditions that external dispute resolution bodies had to meet to be considered compatible with the CJEU's powers to provide final and binding interpretation of EU law grew in complexity.<sup>74</sup> In the Opinion 2/13, the CJEU seemed to have reached a peak in its constitutional discourse.<sup>75</sup> After making its customary pronouncements on the autonomy of EU law,<sup>76</sup> the CJEU clarified that the powers granted to an external court must not affect interpretation of any aspects of EU law,<sup>77</sup> as well as, the operation of the preliminary ruling procedure, even if an international agreement provides for an effective mechanism ensuring that on matters of EU law the CJEU maintains the final authority.<sup>78</sup> The concerns expressed by the CJEU over the jurisdiction of the European Court of Human Rights (ECtHR) have been considered as exaggerated and resulted in a set of conditions which will be difficult to meet by any future accession agreement.<sup>79</sup> Moreover, the expression of the strong commitment towards pluralism in the Opinion 2/13 raised further doubts about the feasibility of the EU's future accession to the ECHR<sup>80</sup> and the possibility of continuing cooperation between courts in Luxembourg and

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<sup>72</sup> Opinion 1/91 (n 26) para 41.

<sup>73</sup> Bruno De Witte (n 69), 37.

<sup>74</sup> Opinion 1/09 (n 37); Opinion 2/13 (n 10).

<sup>75</sup> Eeckhout comments that "Opinion 2/13 is based on a concept of the autonomy of EU law that borders on autarky". Piet Eeckhout, 'Opinion 2/13 on the EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?' (2015) 38 Fordham Int'l LJ 955, 992; a similar Opinion was expressed by Bruno de Witte and Šejla Imamovi in Bruno De Witte and Šejla Imamovi, 'Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court' (2015) 40(5) EL Rev 683, 695

<sup>76</sup> Opinion 2/13 (n 10), paras 172-184.

<sup>77</sup> Opinion 2/13 (n 10), paras 242-243.

<sup>78</sup> Opinion 2/13 (n 10), paras 197-199.

<sup>79</sup> Bruno De Witte, Šejla Imamovi (n 75) 683; Piet Eeckhout (n 75) 992.

<sup>80</sup> Bruno De Witte, Šejla Imamovi (n 75) 704.

Strasbourg.<sup>81</sup> This in turn provokes more general questions concerning willingness of the CJEU to accept jurisdiction of any external judicial bodies, including international investment tribunals which will derive their jurisdiction from the EU's future investment agreements.

Despite the fact that, CJEU's case law sets strict jurisdictional limits, the principle that external courts could be compatible with EU law in theory remains valid.<sup>82</sup> Thus, these past decisions should be considered within their specific contexts and taking into account characters of the judicial authorities that were evaluated, which in many respects differ from the system of investment arbitration. One of the differences between the EU investment treaties and the EEA Agreement examined in the Opinion 1/91 is that the former do not mirror provisions found in the EU Treaties, as their objective is not to extend the *acquis communautaire* to third countries. In fact, the argument that the scope of traditional BITs<sup>83</sup> and EU Treaties are identical was previously rejected by investment tribunals<sup>84</sup> and in the literature.<sup>85</sup> Therefore, as investment protection norms permeate the EU legal order upon the entry into force of the EU's investment treaties, there will be no need to ensure their homogenous interpretation with provisions of EU law.<sup>86</sup>

Although investment agreements and EU Treaties are not identical, transfer provision in BIT correspond to free movement of capital rules in the TFEU.<sup>87</sup> With regards to this, a similar substantive overlap rendered the EU's accession agreement to the ECHR incompatible with EU law. In the Opinion 2/13 the CJEU held that a possibility of a Member State asking a question of interpretation of a provision that is contained both in the European Convention on Human Rights (ECHR) and the EU Charter of Fundamental Rights to ECtHR instead of CJEU undermined the autonomy of EU law.<sup>88</sup> However, absence of the rule of precedent which is a characteristic of the system of investment arbitration<sup>89</sup> may preclude such incompatibility from arising in relation to EU investment

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<sup>81</sup> Piet Eeckhout (n 75) 990.

<sup>82</sup> Opinion 2/13 (n 10) para. 182.

<sup>83</sup> The EU's new investment agreements to large extent follow the model of traditional BITs of EU Member States. Commission (n 21) 11.

<sup>84</sup> Eastern Sugar B.V. v Slovak Republic, Partial Award, SCC, (27 March 2007), paras 159-169; Eureko B.V. v Slovak Republic, Award on Jurisdiction, Arbitrability and Suspension, PCA Case No. 2008-13, (26 October 2010), paras 239-245.

<sup>85</sup> August Reinisch (n 68) 162-172.

<sup>86</sup> Cf: Opinion 1/91 (n 26) paras 42-45.

<sup>87</sup> August Reinisch (n 64) 168.

<sup>88</sup> Opinion 2/13 (n 10) para 197.

<sup>89</sup> Marc Bungenberg and Catharine Titi, 'Precedents in International Investment Law' in Marc Bungenberg, Jörn Griebel, Stephan Hobe, August Reinisch (eds), *International Investment Law: A Handbook*, (Namos

agreements. To that end, investment tribunals under current EU investment treaties are not tasked with ensuring a uniform interpretation and application across all contracting parties of the rules contained in an agreement from which they derive their jurisdiction and their awards are only binding on parties to the dispute. Therefore, their decision will not compel courts of the EU to a particular interpretation of any provisions and because of that investment tribunals should not be considered a threat to the CJEU's powers to provide final and binding interpretation of EU law.

### **6.5.3. Specific Provisions of EU Investment Agreements, which Seek to Minimise Jurisdictional Conflict**

In addition to this, the general practice of investment tribunals demonstrates that EU law is applied in investor-state disputes only as a matter of fact. This has been confirmed for example in *Achmea v Slovakia*, where the tribunal expressly clarified that it did not rule on the conformity of the action of the disputing parties with EU law.<sup>90</sup> It appears in the current drafting of the EU investment treaties that the Commission decided to include provisions that codify this practice in order to ensure compatibility of investor-state dispute resolution mechanism with EU law. Thus the drafting of applicable law clauses in EU investment chapters, as recommended by some commentators,<sup>91</sup> limits powers of an investment tribunal to interpret only provisions of an international agreement from which it derives an authority, together with other rules of international law.<sup>92</sup>

Moreover, later versions of the applicable law clause display a particular regard for the autonomy of the EU legal order and the essential character of the CJEU's powers. Unlike the early drafts of the EU-Singapore FTA<sup>93</sup> and CETA,<sup>94</sup> the subsequent treaties contain additional wording which expressly clarifies that investment tribunals are allowed to consider domestic law only as a matter of fact and in doing so they are bound by the interpretation of the domestic courts.<sup>95</sup> Furthermore, the new provisions specify that any meaning given to domestic law by an investment tribunal will not have any effect upon

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2015), 1515; Campbell McLachlan QC, Laurence Shore, Matthew Weiniger, *International Investment Arbitration: Substantive Principles*, (OUP 2010) ,384.

<sup>90</sup> *Achmea B.V. v The Slovak Republic*, Final Award, PCA Case No. 2008-13 (7 December 2012), para 276.

<sup>91</sup> Schill, (n 38), 51.

<sup>92</sup> EU-Singapore FTA (n 58) Ch 9, Art 9.19; EU Vietnam FTA (n 58) Ch 8 Art 16; CETA (n 24) Ch 8, Art 8.3.

<sup>93</sup> EU-Singapore FTA (n 73), Ch 9, Art. 9.19.

<sup>94</sup> Consolidated CETA Text, Published on 26 September 2015, CH X, Art. X.27.

<sup>95</sup> CETA (n 24), Ch 8, Art. 8.31; EU-Vietnam FTA (n 73), Ch 8, Art. 16.

the decisions of the domestic courts and finally that investment tribunals may not rule on the legality of a measure under the domestic law,<sup>96</sup> which echoes previous jurisprudence of the CJEU on the subject of compatibility of external tribunals with EU law.<sup>97</sup>

## **6.6. Application of EU Law in Investment Disputes and Autonomy of EU law**

It is apparent from the current drafting of EU investment treaties that the Commission has taken into account previous case law of the CJEU in order to ensure compatibility of investor-state dispute resolution mechanism with EU law. The Commission sought to achieve this goal through ensuring that the jurisdictional scopes of the CJEU and investment tribunals are kept separate. Nonetheless, express limitations placed upon the powers of investment tribunals' with respect to interpretation of EU law not render its provisions irrelevant in investment arbitration and because of that the current solution may not be sufficient to safeguard autonomy of EU law.

At the moment, the applicable law clauses in EU investment agreements require that application of EU law by investment tribunals is compliant with jurisprudence of the CJEU. However, fulfilment of this requirement can be achieved only insofar as case law of the CJEU exists. Investment treaties negotiated to date by the Commission do not provide a mechanism that would enable a tribunal to clarify with the Luxembourg Court novel points of EU law, which may be relevant in investor-state disputes. It has been highlighted in this chapter that the CJEU has been very strict in its assessment of compatibility of external judicial bodies with EU law and approached all of them with suspicion. There are signs in existing jurisprudence of the Court indicating that lack of a mechanism for ensuring correct application of EU law, even as a matter of fact, may be considered to undermine broadly defined autonomy of EU legal order. In cases concerning commercial arbitration, for example, the CJEU has stated that it was within interests of the EU to ensure that provisions of EU law are applied in a uniform manner irrespective of circumstances.<sup>98</sup> Furthermore, in Opinion 1/09 the Court has highlighted that correct application and uniform interpretation of EU law must be ensured to guarantee its effectiveness.<sup>99</sup> Therefore, a question arises whether the current solution

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<sup>96</sup> Ibid.

<sup>97</sup> Opinion 1/91 (n 26); Opinion 1/00 *Proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area* [2002] ECR I-03493 (Opinion 1/00).

<sup>98</sup> Case C-88/91 *Federconsorzi* [1992] ECR I-04035, para. 7; Case C-126/97 *Eco Swiss* [1999] ECR I-03055; para. 39.

<sup>99</sup> Opinion 1/09 (n 37) para 84.

implemented by the Commission in the EU investment agreements fulfils these criteria and sufficiently safeguards the integrity of EU law.

In the past, the CJEU was satisfied that correct application of EU law can be sufficiently guaranteed by courts of the Member States. In *Eco Swiss*<sup>100</sup> and *Nordsee*<sup>101</sup> it was held that application of EU law in arbitration should be open to examination by national courts of Member States to determine the validity of the award.<sup>102</sup> This ensures applicability of Article 267 TFEU, which allows and requires courts of Member States to submit questions concerning interpretation of EU law in preliminary ruling requests to the CJEU. The main function of the procedure is to ensure uniform application of the Treaty, hence its applicability guarantees effectiveness of EU law and integrity of the EU legal order.<sup>103</sup> As the procedure for resolving investor-state disputes derives from commercial arbitration, the system permits in some circumstances for review of an award by courts of a host state.

Investment treaties negotiated to date permit multiple procedural rules to be used for resolving investor-state disputes, including: ICSID Convention, UNCITRAL Arbitration Rules, or an *ad hoc* procedure negotiated by the parties.<sup>104</sup> A review of an arbitral award can be conducted by the courts of the Member States in annulment proceedings, if the seat of arbitration is within the EU and it is governed by procedural rules other than those contained in the ICSID Convention.<sup>105</sup> In such cases, the domestic courts of Member States are competent to scrutinise whether investment tribunals applied EU law correctly and can refer questions to the CJEU through the preliminary ruling procedure under Article 267 TFEU. The recognition and enforcement of non-ICSID can be refused on grounds of public policy in accordance with Article V of the New York Convention,<sup>106</sup> which sufficiently allows for a review of their compliance with core principles of EU law.<sup>107</sup>

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<sup>100</sup> Case C-126/97 *Eco Swiss* [1999] ECR I-03055.

<sup>101</sup> Case 102/81 *Nordsee Deutsche Hochseefischerei GmbH* [1982] ECR 1095.

<sup>102</sup> Case C-126/97 *Eco Swiss* [1999] ECR I-03055, para 20; *Ibid.*, para. 14.

<sup>103</sup> *Ibid.*

<sup>104</sup> EU-Singapore FTA (n 58) Art 9.16(1); EU-Vietnam FTA (n 58) Art 7(2); CETA (n 24) Art 8.23(1).

<sup>105</sup> Lars Markert and Helene Bubrowski, 'National Setting Aside Proceedings in Investment Arbitration' in Marc Bungenberg, Jörn Griebel, Stephan Hobe, August Reinisch *International Investment Law: A Handbook*. (Nomos Wilhelmstraße), 1462.

<sup>106</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards (United Nations 1958).

<sup>107</sup> Case C-126/97 *Eco Swiss* [1999] ECR I-03055, para 40.

However, the mechanism which allows the domestic courts to scrutinise investment awards has some gaps. One of them is that a review of the arbitral award by the domestic courts of the Member States and the CJEU can be circumvented. As none of the EU investment agreements negotiated to date specifies a seat of arbitration, in some circumstances, such a choice could be left to the parties to a dispute.<sup>108</sup> Although it is unlikely that in a case of a dispute between EU and a foreign investor, a place of arbitration outside of the EU will be chosen, such a scenario could be more probable in the context of disputes in which a Member State is a respondent. As the choice of the seat determines rules applicable to setting aside proceedings,<sup>109</sup> if arbitration is conducted outside of the EU, the courts of Member States and the CJEU will not enjoy a jurisdiction to review such awards.

Another problem arises due to the availability of ICSID Convention, which provides a self-contained review system.<sup>110</sup> As the Convention allows for annulment of an investment award to be undertaken only by an *ad hoc* committee appointed by the ICSID Chairman,<sup>111</sup> the domestic courts do not enjoy a power to review decisions rendered pursuant to ICSID Rules.<sup>112</sup> Thus, in such cases a possibility of referring questions on matters of EU law to the CJEU is foreclosed, because preliminary ruling procedure in Article 267 TFEU is only available to courts or a tribunals of a Member State. In the past, the CJEU has consistently held that arbitrators did not qualify as such, because ‘the parties are under no obligation, in law or in fact, to refer their disputes to arbitration and the public authorities of the Member State concerned are not involved in the decision to opt in for arbitration nor required to intervene of their own accord in the proceedings before the arbitrator.’<sup>113</sup> Also, grounds for review under ICSID, are narrower and do not encompass violations of public policy, which in accordance with the CJEU’s past case law may not provide a sufficient guarantee that EU law has been applied correctly by tribunals in these cases.<sup>114</sup>

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<sup>108</sup> Monique Sasson, ‘Investment Arbitration: Procedure’ in Marc Bungenberg, Jörn Griebel, Stephan Hobe, August Reinisch *International Investment Law: A Handbook*. (Nomos Wilhelmstraße), 1303-1304.

<sup>109</sup> Lars Markert and Helene Bubrowski (n 105) 1462.

<sup>110</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Art 52.

<sup>111</sup> *Ibid.*

<sup>112</sup> Lars Markert and Helene Bubrowski (n 105).

<sup>113</sup> Case C-102/81 *Nordsee* [1982] ECR 1095, paras. 10-12; Case C-126/97 *Eco Swiss* [1999] ECR I-03055, para 34.

<sup>114</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Art 52; Christopher F Dugan, Don Wallace Jr, Noah D Ribins and others (n 19) 629-630.

What is more, not all EU investment agreements permit annulment. In its initial Communication on the future of the EU's investment policy, the Commission decided against formulating an EU Model BIT, as it wished to maintain flexibility to adapt to the needs of its negotiating partners.<sup>115</sup> As a consequence, substantial inconsistencies can be identified in investment agreements concluded to date by the EU with different third countries and one of them occurs in relation to the dispute resolution procedure. FTA negotiated with Vietnam is an example of an agreement provisions of which do not permit for an annulment of arbitral awards,<sup>116</sup> in contrast to CETA, which makes such an option available.<sup>117</sup> The solution in the EU-Vietnam FTA, which has been adopted after the introduction of the Investment Court System for the first time in CETA, can be regarded as another step towards creation of the Multilateral Investment Court. Such an international body, unlike some investor-state tribunals, will exist entirely outside of the structures of EU courts. Therefore, it is expected that its procedural rules will provide for a self-contained appeals system, precluding the involvement of national courts of the Member States in ensuring correct application of EU law.

At the moment, EU agreements that exclude a possibility of annulment at the seat of arbitration, provide that an authority responsible for ensuring correct application of EU law is the appeals tribunal.<sup>118</sup> In accordance with the provisions of the new investment treaties, it is within the powers of the appeals tribunal to reverse an award if it finds errors of interpretation or application of the relevant law.<sup>119</sup> However, similarly to the ICSID *ad hoc* Committee, the new appeals tribunal cannot submit questions of interpretation to the CJEU.<sup>120</sup> Therefore, in those circumstances correct application of EU law can only be ensured with respect to matters of EU law which are *acte clair*.

The CJEU has accepted in the past that an external mechanism performing a function of ensuring correct application of EU law was a sufficient safeguard of its integrity.<sup>121</sup> However, an external court that was considered acceptable had access to the CJEU's interpretation of EU law through a bespoke preliminary ruling procedure and its decisions

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<sup>115</sup> Commission (n 21) 6; Critically on the decision of the Commission not to formulate Model BIT: N. Jansen Calamita, 'The Making of Europe's International Investment Policy: Uncertain First Steps' (2012) 39 *Legal Issues of Economic Integration* 301

<sup>116</sup> EU-Vietnam FTA, (n 58) Art 31.

<sup>117</sup> CETA (n 24) Art 8.41.

<sup>118</sup> EU-Vietnam FTA (n 58) Art 28; CETA (n 24) Art. 8.28.

<sup>119</sup> *Ibid*.

<sup>120</sup> EU-Vietnam FTA, (n 58) Art 28.

<sup>121</sup> Opinion 1/00 (n 97) para 46.



were only binding upon third countries and not upon the Union, its institutions or Member States.<sup>122</sup> In this context, EU investment agreements similarly specify that the meaning given to domestic law by investment and appeals tribunals shall not have a binding effect upon the domestic courts, which is a solution intended to preserve uniformity and integrity of Union law.<sup>123</sup> Nonetheless, the main disadvantage of the dispute resolution mechanism in EU investment agreements is lack of a bespoke preliminary ruling procedure.<sup>124</sup> Consequently, the appeals tribunal can guarantee the correct application of EU law only with respect to matters which are *acte clair*, which could be a cause of its future rejection by the CJEU.

### **6.7. Ensuring Correct Application of EU Law in Investor-State Disputes**

As indicated above, in the past, the CJEU was willing to extend the scope of its powers and permit a court outside of the judicial structure of the EU to submit questions for preliminary rulings.<sup>125</sup> The issue arose for the first time in the context of the EEA agreement, which contained a mechanism granting courts of the European Free Trade Association (EFTA) States access to the CJEU.<sup>126</sup> In the first Opinion on this matter, the CJEU acknowledged that the EU Treaties did not prohibit it from considering questions relating to interpretation of an international agreement, but rejected the proposed mechanism due to lack of guarantees that decisions rendered would be binding upon the courts of the EFTA States.<sup>127</sup> The CJEU considered that providing opinions which are merely advisory was against the nature of its functions, which was to give binding judgments and for that reason would have adversely affected the integrity of the EU legal order.<sup>128</sup> As the issue was rectified in the revised version of the agreement, the preliminary ruling mechanism was considered compatible with EU law.<sup>129</sup> A similar question concerning access to preliminary rulings from the CJEU arose in Opinion 1/00

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<sup>122</sup> Ibid para 45.

<sup>123</sup> EU-Singapore FTA (n 58) Art 9.19, EU-Vietnam FTA (n 58) Art 16; CETA (n 24) Art 8.31.

<sup>124</sup> Konstanze Von Papp, 'Clash of "Autonomous Legal Orders": Can EU Member State Courts Bridge the Jurisdictional Divide between Investment Tribunals and the ECJ? A Plea for Direct Referral from Investment Tribunals to the ECJ' (2013) 50 Common Market Law Review 1039; Matthew Parish, 'International Courts and the European Legal Order' (2012) EJIL. 141; Schill (n 38) 51; Burgstaller M, 'Investor-State Arbitration in EU International Investment Agreements with Third States' (2012) 39(2) Legal Issues of Economic Integration 207; Lavranos (n 64) 147.

<sup>125</sup> Opinion 1/91 (n 26) para 58; Opinion 1/09 (n 37) para.75; Opinion 1/00 (n 97) para 20; Opinion 1/92 revised *Agreement on the European Economic Area Opinion* (Opinion 1/92) [1992] ECR I-2821 para 32.

<sup>126</sup> Opinion 1/91 (n 26) para 55.

<sup>127</sup> Opinion 1/91 (n 26) para 65.

<sup>128</sup> Ibid para 61.

<sup>129</sup> Opinion 1/92 (n 125) para 35.

on the compatibility with EU law of an agreement creating a European Common Aviation Area (hereafter the ECAA Agreement).<sup>130</sup> In this Opinion, the CJEU also allowed an external court to submit questions,<sup>131</sup> in line with its previous decision on the EEA agreement.<sup>132</sup>

The two cases evaluated above involved agreements which had a similar aim, as both of them sought to extend *acquis communautaire* beyond the EU<sup>133</sup>. Thus, the dialogue between any bodies established for the purpose of enforcing these agreements with the CJEU was essential to fulfil these objectives. Preliminary ruling mechanisms that were established extended jurisdiction and influence of the CJEU, but at the same time ensured that external courts had powers to scrutinise correct application of EU law only by third states and their decisions had no binding effect on the EU or Member States.<sup>134</sup> Thus, a common characteristic of these judicial bodies was that they were established outside of the system of EU courts and their jurisdiction and authority remained in that external sphere. This ensured that operation of the external courts in no way threatened uniform interpretation of EU law, or operation of any constitutional doctrines or procedures that were designed to ensure it.<sup>135</sup> Hence, the essential character of the CJEU's powers was preserved in relation to the internal market and its zone of authority was extended, which if viewed from the perspective of the neofunctionalist assumption that the EU institutions are self-interested actors, could be a factor that have facilitated the Court's decision on compatibility of these judicial bodies with EU law.

In the light of the case law evaluated in this chapter, it appears that so far the CJEU has been willing to engage in a dialogue only with external judicial authorities that aim to extend the reach of EU law beyond the borders of the internal market. This is also confirmed in Opinion 1/09 where the Court held that a proposed patents court was not compatible with EU law.<sup>136</sup> Few aspects distinguish the patents court from the enforcement authorities examined by the CJEU in the Opinions mentioned in the previous paragraphs. First of all, the jurisdiction of the patents court encompassed not only third

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<sup>130</sup> Opinion 1/00 (n 97).

<sup>131</sup> Ibid paras 21-46.

<sup>132</sup> Opinion 1/92 (n 125). 35.

<sup>133</sup> Opinion 1/91 (n 26) para 4; Opinion 1/00 (n 97) para 3.

<sup>134</sup> Opinion 1/92 (n 125) para 19; Opinion 1/00 (n 97) para 15-16.

<sup>135</sup> Opinion 1/92 (n 125); Opinion 1/00 (n 97) paras 45-46.

<sup>136</sup> Opinion 1/09 (n 37) paras 88 and 89.

countries, but also Member States<sup>137</sup> and in the first Opinion on the EEA agreement the CJEU already gave signals that it did not like such an arrangement.<sup>138</sup> Secondly, the external court in this case was granted powers to provide interpretation of EU law that was binding on the Member States, albeit a dialogue with the CJEU was enabled through a bespoke preliminary ruling procedure, which was designed to protect the essential character of the role of the CJEU as a final arbiter of EU law.<sup>139</sup>

The CJEU, however, was not satisfied with this arrangement and its main objection related to the fact that an external court would have taken over the function of applying EU law ordinarily performed by the courts of Member States.<sup>140</sup> This ruling is a serious obstacle in a way of both the Investment Court System and Multilateral Investment Court proposed by the Commission, as in the Opinion 2/15 the CJEU reasoned, in a similar vein, that the system established in the EU investment agreements removes disputes from the jurisdiction of courts of the Member States.<sup>141</sup> This, can be considered as a subtle indication of the direction that the CJEU may take when examining compatibility of investor-state dispute resolution mechanism with EU law.

In Opinion 1/09 the CJEU reaffirmed that the courts of the Member States are an essential part of the system for ensuring uniformity of EU law and an authority, which is created outside of the structure of the EU Treaties cannot replace them in performing this function, even if such a body has powers to request a ruling on the interpretation of EU law from the CJEU.<sup>142</sup> In the Court's view an external authorities cannot guarantee effectiveness of EU law through a bespoke preliminary ruling procedure because their decisions are not subject to judicial review under the Treaty, unlike those of the courts of Member States.<sup>143</sup>

In the light of the Opinion 1/09, the main problem with the proposed Investment Court System in CETA is that by allowing foreign investors to remove disputes from the jurisdiction of the courts of Member States, the mechanism creates a possibility for circumventing preliminary ruling procedure. Similar issue not only rendered patents court

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<sup>137</sup> Ibid para 79.

<sup>138</sup> Opinion 1/91 (n 26) paras 33-36.

<sup>139</sup> Opinion 1/09 (n 37), paras 78, 79.

<sup>140</sup> Ibid para 79.

<sup>141</sup> Opinion 2/15 *Free Trade Agreement between the European Union and the Republic of Singapore* [2017] OJ C239/3 (Opinion 2/15), para 292.

<sup>142</sup> Opinion 1/09 (n 37).

<sup>143</sup> Opinion 1/09 (n 37) para 89.

incompatible with EU law, but was also a reason behind the CJEU rejecting jurisdiction of the ECtHR<sup>144</sup>. Neither establishment of a Multilateral Investment Court, nor a bespoke preliminary ruling procedure can remedy this situation, as the mechanism will necessarily be established outside of the EU court structure, because it will incorporate in its jurisdiction third states. Consequently, actions of investor-state dispute resolution bodies cannot be subjected to the judicial review under EU Treaties, which is essential if an external court removes disputes from the jurisdiction of the courts of Member States, according to the CJEU's Opinion 1/09.

The reason why the EFTA court and the judicial body established by the ECAA agreement were permitted to ensure correct and uniform application of EU law was that their decisions were addressed to and bound only third countries.<sup>145</sup> In the light of the Opinion 2/15, it is not going to be possible to keep the jurisdiction of any investor-state dispute resolution mechanism separate from that of the courts of the EU, similarly to abovementioned external judicial bodies.<sup>146</sup> In this context, the Commission's efforts to ensure that EU law is applied only as a matter of fact by investor-state dispute resolution body does not seem like a sufficient solution. This conclusion is further strengthened by the fact that in Opinion 1/09, the CJEU has emphasised that the function of Article 267 TFEU is to ensure not only uniform interpretation, but also correct application of EU law to guarantee that in all circumstances it has the same effect.<sup>147</sup> Thus, existence of a possibility to circumvent that procedure, by removing cases from the jurisdiction of the Member States by foreign investors is likely to be considered incompatible with EU law.

In relation to the patents regime the situation was remedied by removing membership of third countries and bringing the court completely within the judicial structures of the EU.<sup>148</sup> This turned the Unified Patents Court into a court of Member States, which brought it within the scope of the Treaty enabling judicial review of its decisions and imposition of liability for incorrect application or interpretation of EU law.<sup>149</sup> A similar solution implemented in relation to Multilateral Investment Court would undermine the

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<sup>144</sup> Opinion 2/13 (n 10) para 198.

<sup>145</sup> Opinion 1/92 (n 125); Opinion 1/00 (n 97) paras 45-46.

<sup>146</sup> Opinion 2/15 (n 141) para 292.

<sup>147</sup> Opinion 1/09 (n 37) para 83, 84.

<sup>148</sup> Thomas Jaeger, 'Back to Square One? An Assessment of the Latest Proposal for a Patent and Court for the Internal Market and Possible Alternatives' (2012) 43 *International Review of Intellectual Property and Competition Law* 286, 297.

<sup>149</sup> *Ibid.*

objective of the EU's international investment policy to promote and protect foreign investment outside of the internal market. However, the aim of bringing in investor-state dispute resolution mechanism within the structures of EU courts to ensure effective operation of Article 267 TFEU can be achieved in a different way. This effect can be attained by abandoning the plans to create a Multilateral Investment Court and maintaining traditional character of investor-state arbitration, but ensuring that review by the EU courts is always possible in cases involving one of the Member States as a respondent. This would require both limiting party discretion with regards to selection of a seat of arbitration and dispensing with ICSID Convention in EU investment agreements.

The CJEU's decision that Investment Court System proposed in CETA is incompatible with EU law will be a significant setback for the EU investment policy. It will not, however, mean the end of it. The Commission is known for testing feasibility of its initiatives before the Court, which has been visible with regards to the patents regime. The Commission has been prepared for the CJEU's rejection of investor-state dispute resolution mechanism, by implementing its reform of the system in two stages. Thus, even if the ruling on Investment Court System in CETA does not go the Commission's way, it provides a useful guidance on how to ensure compatibility of the Multilateral Investment Court with EU law in the future. Unfortunately, case law concerning external courts and tribunals, combined with the latest Opinion 2/15 suggest that the CJEU is also likely to hold unfavourable views about the multilateral court.

The analysis above have demonstrated that the CJEU has been willing to conduct dialogue only with two types of judicial institutions. Firstly, there are courts and tribunals of Member States which are within the judicial structures of the EU. Secondly, there are courts and tribunals which are completely outside of the judicial structure of the EU and their decisions are not in any way binding on the EU, its institutions and Member States. This approach confirms strongly pluralistic position of the CJEU that does not consider a possibility of meaningful cooperation with other authorities responsible for enforcement of international law. Nonetheless, it allows the CJEU to fulfil its duties as a constitutional court in ensuring uniform and correct interpretation of EU law, which is essential for guaranteeing integrity of EU legal order and continuity of the process of integration. This approach is also consistent with the neofunctionalist depiction of the Court as a self-interested actor in the process of creating an ever closer Union, as well as, a guardian of the process of integration.

Notwithstanding the arguments concerning incompatibility of proposed investor-state dispute resolution systems with EU law, it has been demonstrated that the Court responds to functional pressures.<sup>150</sup> A complete rejection of the Commission's proposal would have negative implications not only for the investment policy, but also future integration in the CCP. Moreover, it could also create uncertainty with regards to the validity of the Energy Charter Treaty as matter of EU law and continued membership of the Member States. Thus, the Court's decision on incompatibility of investor-state dispute resolution system with EU law may not only impacts on the future of investment in the EU, but could also adversely affect current investment environment in the internal market. To date the Court remained cautious with regards to the Union's new investment powers, by giving full effect to the will of the Treaty drafters in relation to the division of competences.<sup>151</sup> Nonetheless, from the neofunctionalist perspective, the CJEU's perception of the functional pressures could impact on the decision.

## **6.8. Conclusions**

As demonstrated in the first part of this Chapter the CJEU has been traditionally depicted by the neofunctionalist theory of integration as an influential actor of the EU integration. The court possesses wide discretion which it has used in the foundational period to create functional pressures that facilitated continued transfer of competences from the Member States to the Union.

However, the strongly pluralistic approach of the CJEU towards international law and its relationships with external courts and tribunals stand in the way of the development of the EU investment policy. In performing its functions as a guardian of the Treaty, the CJEU has been uncompromising in protecting the autonomy of the EU legal order.

The jurisprudence of the CJEU indicates that the Investment Court System in CETA is likely to be considered incompatible with EU law. Although the Commission has implemented strategies to alleviate negative effects of this countervailing pressure, these solutions may not sufficiently guarantee compatibility of Multilateral Investment Court with EU law. If these predictions materialise, EU investment treaties will be deprived of an effective dispute resolution system, which would undermine the effectiveness of the

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<sup>150</sup> Niemann (n 5)

<sup>151</sup> Opinion 2/15 (n 141)

Commission's reform and efforts of the institution to establish itself as a credible actor, putting into question continued action of the EU in the field.

Consequently, when considering the dialectical nature of the process of integration in the sphere of the CCP, in accordance with the revised neofunctionalist framework, the Court's traditional depiction as a source of positive pressures can be contested. The Court adds strengths to the countervailing forces stemming from the Council and efforts of these two institutions are directed in the opposite way to those of the Commission and the European Parliament. Since the Court has discretion to alter rules of the game, it has powers to put limits on the future development of the common investment policy and potentially future integration in the CCP.

## Chapter 7.

### Conclusions

The Treaty of Lisbon 2009 has opened up new possibilities for EU external action. From the perspective of the neofunctionalist theory of integration amendments introduced in this area of EU competence have created new functional pressures for further integration in the CCP. In relation to this sphere, the post-Lisbon era has been dominated by developments surrounding the expansion of the EU's competences into the field of international investment. The neofunctionalism is a theory that relies on actors in providing description and explanation of dynamics that lead to transfer of powers from the Member States to supranational centres.<sup>1</sup> The EU institutions have also been the main focus of the analysis in this thesis. In this context, the research question, which was evaluated on the preceding pages concerned contribution of the EU institutions to the development of the common international investment policy and impact that their actions have had on the process of integration in the CCP.

One of the main changes that later accounts have brought to the neofunctionalist framework was to dispense with the idea that spillover occurs automatically.<sup>2</sup> In relation to this, the revised neofunctionalist framework has emphasised the role of actors in cultivating pro-integrative forces that arise out of functional structures in order to move the process of integration forward.<sup>3</sup> In line with this, it was further proposed that progress in a particular field would be achieved only if actors perceived functional pressures as strong enough to act upon them. The deterministic ontology in the revised neofunctionalist framework has been replaced with the depiction of integration as a dialectical process, i.e. one that is affected by positive and negative forces<sup>4</sup>. Consequently, the revised neofunctionalist framework has proposed that progress in the process of integration occurs when the strength of pro-integrative forces outweighs that

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<sup>1</sup> Ben Rosamond, 'The Uniting of Europe and the Foundation of the EU Studies: Revisiting the Neofunctionalism by Ernst B. Haas' (2005) 12 *Journal of European Public Policy* 237.

<sup>2</sup> Jeppe Tranholm-Mikkelsen, 'Neo-functionalism: Obstinate or Obsolete? A Reappraisal in the Light of the New Dynamism of the EC' (1991) 20 *Millennium* 1; Arne Niemann, *Explaining Decisions in the European Union* (CUP 2006).

<sup>3</sup> *Ibid*; Rosamond (n 1); Alec Stone-Sweet, *The Judicial Construction of Europe* (OUP 2004); Eric Stein, 'Lawyers, Judges and the Making of a Transnational Constitution' (1981) 75 *Am.J.Int'l L.* 1; Anne-Marie Burley and Walter Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) 47 *International Organization* 42; De Búrca G, 'Rethinking Law in Neofunctionalist Theory' (2005) 12(2) *Journal of European Public Policy* 310.

<sup>4</sup> Niemann (n 2) 31.



of countervailing ones. In line with this assumption, actions of the EU institutions who have formal powers to shape the EU's common investment policy, i.e. the Commission, the European Parliament, the Council and the Court was on conducted in this thesis and based on their contribution, these institutions were identified either as sources of pro-integrative pressures (the Commission and the European Parliament), or countervailing forces (the Council and the CJEU). The doctrinal analysis conducted herein allowed to uncover the interinstitutional conflict, which has helped in evaluating relative strength of negative and positive pressures and account for likely future course of integration in the CCP. These findings have been summarised below.

Sections bellow sum up the analysis conducted in this PhD. The first part outlines functional structures that arose with the entry into force of the Treaty of Lisbon 2009 and the following summarise how agents such as the Commission and the Parliament have sought to exploit them to further the process of integration and what was the reaction of more cautious actors, i.e. the Council and the CJEU. The last evaluates the overall balance of the dialectical process of integration in the CCP in the post-Lisbon era.

### ***Investment as the New Frontier for the EU- Framework and Challenges after the Treaty of Lisbon 2009***

The addition of FDI to the scope of Article 207 TFEU in Treaty of Lisbon 2009 has started a new phase in the process of integration in the CCP. From the perspective of the neofunctionalist theory, this amendment has created a strong pressure for further transfer of investment competences to the EU. Although the negotiating history indicates a lack of intention on the part of the Member States to cede their powers with respect to the conclusion of BITs to the Union, the unintended consequence of their decision with regards FDI has been the development of the common international investment policy. Therefore, the interinstitutional dynamics in the post-Lisbon era has been occurring within a functional structure that enables the Union to further expand its competences and eventually replace Member States as actors in the field of international investment protection.

Parallels can be drawn between integrative pressures that existed in the CCP, in the past, with regards to the spheres of trade in services and intellectual property and those that are currently observed with regards to investment. Consequently, the trend identified in the previous expansion of the exclusive competences of the EU provides guidance on how

the area of EU investment is likely to develop. In this context, it has been observed in Chapter 2, that integration in the CCP has been a gradual process that has resulted out of difficult compromises achieved during Treaty negotiations, since Maastricht 1993. In the light of this, any future transfer of investment competences is expected to take time. The ability of the Union to act as an international actor can be considered, in the neofunctionalist framework, as a strong pro-integrative pressure that has been cultivated by the Commission. However, considerable countervailing forces also exist within the functional framework, making it more difficult for the actors to move the process of integration in the CCP forward.

The scope of the CCP has always been a controversial issue. In its initial decisions concerning the matter the CJEU had displayed signs of activism, by construing the scope EU exclusive competences in a very flexible manner.<sup>5</sup> In this context, the Court adopted the approach that was meant to enable the EU's CCP to effectively respond to the changing realities of global commerce, by allowing its scope to expand accordingly. Thus, in its early jurisprudence the Court emerged as an actor with capabilities to cultivate strong pro-integrative forces that would be able to considerably facilitate the process of integration in the CCP.

However, the Court's reasoning with respect to the delineation of competences in the CCP has changed in the Opinion 1/94, on the WTO Agreements, where it ruled that the EU did not have exclusive powers to conclude GATS and TRIPS.<sup>6</sup> This Opinion has marked the end of expansive dynamism of the CCP propelled by the CJEU. Although the Court did not allow for a broad interpretation of the scope of EU competences, because it would have been against the will of the Treaty drafters, it permitted EU's action in all spheres at the WTO, which created a functional structure that enabled further expansion of competences in the CCP.

The approach adopted by the CJEU in Opinion 1/94 was followed in the ruling on the division of competences in the area of international investment. The CJEU in Opinion 2/15 ruled that matters relating to non-direct investment are outside of the scope of the CCP, because the Treaty drafters had not expressly included them in the scope of Article

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<sup>5</sup> Opinion 1/75 *re Understanding on a Local Cost Standard* [1975] ECR 1359; Opinion 1/78 *re International Agreement on Natural Rubber* [1979] ECR 2871.

<sup>6</sup> Opinion 1/94 *re WTO Agreement* [1994] ECR I-5267.

207 TFEU.<sup>7</sup> Nonetheless, the EU can continue its external action in the sphere of international investment protection, which similarly to the areas of trade in services and intellectual property rights can eventually create sufficiently strong pressure for further integration in the CCP. However, the Court's decision on the division of competences in relation to investor-state dispute resolution mechanism raises uncertainty about future autonomous action of the Union in the field, not only from the perspective of the compatibility of the mechanism with EU law, but also the nature of the EU's powers.<sup>8</sup> Thus, the Opinion 2/15 further confirms the diminishing role of the CJEU as an actor that cultivates pro-integrative pressures in the process of integration in the CCP.

Nonetheless, other actors, such as: the Commission and the European Parliament can use the existing functional structures to cultivate pro-integrative pressures and ensure continuity of the process of integration in the CCP. Though, a specific context of international investment poses many complex challenges and strong countervailing forces have been identified in the functional framework, since the entry into force of the Treaty of Lisbon 2009. Some of the biggest challenges ahead of the supranational actors include ensuring future compatibility of the investor-state dispute resolution system with EU law, as well as appeasing currently strong feelings of sovereignty consciousness on the part of the Member States due to future replacement of their BIT networks with EU investment agreements and as a consequence loss of visibility on the international scene. As the EU faces them for the first time, a successful outcome of the implementation of the EU's investment policy cannot be taken for granted, based on the past trend in the evolution of the CCP. This conclusion is consistent with the revised neofunctionalist framework, which has dispensed with the deterministic 'end of ideology' narrative and rejected the assumption that spillover occurs automatically.<sup>9</sup> Thus, the future progress of integration in the CCP will depend upon abilities of the Commission and the European Parliament to cultivate positive pressures that are strong enough to outweigh the countervailing forces flowing from the Council and the CJEU.

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<sup>7</sup> Opinion 2/15 *Free Trade Agreement between the European Union and the Republic of Singapore* [2017] OJ C239/3 (Opinion 2/15).

<sup>8</sup> *Ibid* para 292.

<sup>9</sup> Niemann (n 2) 31.

### ***The Commission's Contribution towards the Development of the Common Investment Policy and Its Role in the Process of Integration in the CCP***

The Commission has been a key actor in the development of the common investment policy, consistently with the assumptions of the neofunctionalist theory of integration, which depict the institution as the engine of the EU integration.<sup>10</sup> In to the sphere of investment, the Commission has utilised its vast experience in cultivating functional pressures for securing further transfer of powers to the EU and presented a comprehensive strategy for pursuing this goal in the area of investment. The Commission's main tactic has been to implement a holistic reform of the international system for protection of foreign investment with an aim to establish multilateral rules regulating this sphere in the future. The aim behind this bold initiative is to demonstrate to the Member States that a collective action brings them more benefits, than their individual BIT programmes. In this context the Commission has used the fact that the system of international investment protection has been undergoing a legitimacy crisis to its advantage, highlighting to the Member States that a change in this area is not only necessary, but also inevitable. The Member States, however, remain unconvinced and in the light of the dialectical nature of the process of integration this threatens the success of the Commission's action and, as a consequence, hinders future expansion of competences in the CCP.

The Commission utilised its broad powers to pursue actions aimed at securing further transfer of competences on multiple fronts. The first and crucial move made by the Commission towards the attainment of this goal was to announce in an official Communication that the EU intends to use its new FDI powers to develop investment protection rules, which in the future will replace existing network of Member States BITs.<sup>11</sup> This has resolved any doubts as to whether the Union's powers allowed it merely to pursue actions at the WTO and set it on the way towards exclusive investment competence. The Commission also sought to obtain a great degree of control over the existing networks of the Member States' BITs through the regulatory framework for the implementation of the EU investment policy in order to ensure maximum impact of its

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<sup>10</sup> Ernst B Haas, 'International Integration: The European and Universal Process' (1961) 15 *International Organization* 366, 368-369; Leon Lindberg, *The Political Dynamics of European Economic Integration* (Stanford University Press 1963), 73; Niemann (n 2).

<sup>11</sup> Commission, 'Towards a comprehensive European international investment policy' (Communication) COM (2010) 343 final.

international action.<sup>12</sup> As a new actor on the international scene, the Commission sought to ascertain its position through participating in investor-state disputes pursuant to Member State BITs, negotiation of international treaties with influential players in the field of investment such as the USA and Canada and working with other institutions such as UNCTAD or UNICTRAL on the reform of the entire system.

Despite this considerable effort on the part of the Commission, the success of the common investment police should not be taken for granted. The main obstacle in the way are the existing investment policies of the Member States. The EU Member States have a long tradition in concluding BITs and although not all of them have benefited from these treaties in the same way, those that did, established themselves as the norm generators in the field. Therefore, the Commission's efforts to replace the Member States as actors in international investment heightens feelings of sovereignty consciousness, which in the neofunctionalist framework is the strongest of countervailing forces.

Moreover, as demonstrated in Chapter 3, the reform proposal of the Commission significantly departs from the current treaty-making practice of the Member States and, at the moment, it is not fully supported. Nonetheless, the Commission changes proposed by the Commission considerably improve to the current system of protection of international investment and could benefit all Member States. The aim of the reform is to increase regulatory flexibility offered to states in BITs and reduce the discretion of the dispute resolution tribunals. This change, however, involves reduction of investment protection standards offered to investors. In the light of their diverging experience in investor-state arbitration not all Member States support the Commission's reform. However, claims against capital exporting EU Member States, which have been multiplying in recent years is an exogenous pressure that helps the Commission's case for reform. Therefore, conditions for further integration have been created and the task ahead of the Commission is to improve the perception of its action by the Member States in order to increase the strength of this pro-integrative pressure.

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<sup>12</sup> Regulation 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries [2012] OJ L351/40; Regulation 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party [2014] OJ L257/121

The Commission idea for ensuring effectiveness of its reform and creating conditions for further integration also included developing of a multilateral investment treaty and establishing multilateral investment court. The past evolution of the CCP indicates that this could constitute a strong exogenous pressure for further integration. However, this has to be viewed as a highly risky strategy that will not materialise for many years. In the meantime, the pressure the Commission has faced from the Council during the negotiation on the legislative framework means that the EU investment policy has to be implemented alongside the continued action by the Member States, which may considerably delay its effects. Furthermore, as the Member States refused provisional application of CETA, hence the implementation of the Commission's reforms is currently on hold until the CJEU rules on the compatibility of investor-state dispute resolution system with EU law.<sup>13</sup> This significantly undermines the effectiveness of the Commission's efforts in trying to cultivate spillover for further integration in the CCP.

***The European Parliament's Contribution towards the Development of the Common Investment Policy and Its Role in the Process of Integration in the CCP***

The European Parliament has made a substantial contribution to the process of supranationalisation of the CCP, already prior to the entry into force of the Treaty of Lisbon 2009. For many years, the Parliament has pursued a strategy of gradual democratisation and effectively cultivated various pressure within the existing functional structures in order to enlarge the scope of its own powers in different spheres of EU action. The latest Treaty amendments significantly enhanced the position of the European Parliaments in the CCP by granting to the institutions powers of to decide on the legislative framework and consent over international treaties concluded by the EU.<sup>14</sup> Thus, in the post-Lisbon configuration the European Parliament is an actor capable of shaping EU's new common investment policy and cultivating spillover for further integration in the CCP.

The support of the European Parliament for the Commission's reform of the investment protection rules has been essential, as it legitimises the Union's action in the field. Although in the past the cooperation between the Commission and the European

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<sup>13</sup> Council, 'Council Decision on the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part' 10974/16 WTO 196 Services 21 FDI 17 CDN 13' WTO 194 Services 19 FDI 15 CDN 11.

<sup>14</sup> TFEU, Arts 207 and 218.

Parliament was not well developed, since the negotiations of the Treaty of Lisbon 2009, the two institutions seem to be working together to secure further transfer of competences in the sphere of investment, which was particularly visible in the Opinion 2/15.<sup>15</sup> Moreover, the European Parliament has supported the main reform proposals of the Commission with regards to the formulation of the basic investment protection standards, such as expropriation and fair and equitable treatment, as well as, enhancement of states' right to regulate. From the perspective of the revised neofunctionalist framework this can be considered as a positive contribution towards cultivating positive pressures for further integration in the CCP. Additionally, the European Parliament has defended the inclusion of human rights, labour and environmental standards, which contributes towards enhancing coherence of EU external action and its response to the current legitimacy crisis.<sup>16</sup>

However, as the European Parliament is a new actor in the CCP, a highly technical area of EU competence that has been dominated by the EU executive for many years, its powers to influence the content and direction of the EU common investment policy remain relatively weak. Disadvantages in the Parliament's position can be identified in the a lack of a formal right to contribute to the Council's decision on the opening of international negotiations and no competences with respect to authorisation of provisional application of third-country treaties.<sup>17</sup> Nonetheless, the right to be consulted at all stages of negotiations can be considered a significant improvement of the situation that existed before, which did not permit for any parliamentary involvement in the CCP.<sup>18</sup> The European Parliament seems to be utilising the new Treaty framework well by engaging in all stages of negotiations. Although the Commission and the Council are not obliged to take into account the Parliament's suggestions, this is often a precondition for obtaining the parliamentary consent to the signature of an international Treaty.<sup>19</sup> In this context, the European Parliament has used its consent powers in a constructive manner and with rejections of ACTA and US SWIFT Agreement it demonstrated that its views

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<sup>15</sup> Opinion 2/15 (n 7), paras 18 and 25.

<sup>16</sup> TEU, Art 21.

<sup>17</sup> TFEU, Art 218.

<sup>18</sup> Consolidated Versions of the Treaty on European Union and of the Treaty Establishing European Community (Treaty of Nice) [2002] OJ C325/1, Art 133.

<sup>19</sup> TFEU, Art 218.

need to be listened to and concerns should be addressed by the other institutions in order to ensure effective external action of the EU on the international scene.

In so far as the common investment policy is concerned, the European Parliament's position has been significantly undermined by the non-exclusive nature of the EU's competences in this area, which necessitates in use of the mixed procedure for conclusion of EU investment treaties. This has given rise to a difficult to reconcile tension between the European Parliament and national parliaments concerning the function of providing democratic legitimacy to EU external relations. This compromises the effectiveness of the EU on the international scene, which in the neofunctionalist framework can be regarded as a negative pressure in the continuing process of integration in the CCP.

Notwithstanding the fact that the European Parliament's position in the CCP could be improved, the institution has been able to make a meaningful contribution to the development of the common investment policy and is an important source of positive forces in the process of integration in this area. Its support of the Commission's reform proposals helps in cultivating integrative pressures for further transfer of investment competences.

***The Council's Role in the Development of the EU Investment Policy and in the Process of Integration in the CCP post-Lisbon.***

The Council has been identified as one of the main sources of countervailing forces with regards to further integration in the CCP. Since the entry into force of the Treaty of Lisbon 2009 the Member States have demonstrated considerable dissatisfaction with the growing supranationalisation of EU foreign relation. As a representative voice of the Member States the Council contested new amendments to the provisions of EU external actions in numerous cases.

The Council's biggest success in the post-Lisbon litigation was the Opinion 2/15, which confirmed the non-exclusive nature of the EU competences in investment.<sup>20</sup> This outcome satisfies the demands of the Member States for greater control over EU's policy, because a single refusal of consent would prevent any international investment agreement from entering into force. It also allows the Member States to maintain visibility on the international scene, as it requires their participation in the signing ceremonies. However,

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<sup>20</sup> Opinion 2/15 (n 7).



from the perspective of the neofunctionalist framework, participation of all Member States in the conclusion of EU investment treaties is considered as a countervailing force that undermines the effectiveness of the EU's external representation and delays the effect of the common investment policy, which weakens functional pressures for further transfer of powers to the EU.

Member States expressed their deep dissatisfaction not only with the division of competences, but also the new consolidated rules governing the conclusion of international agreements. As evaluated in Chapter 5, in extensive litigation against the Commission and the European Parliament, which has commenced since the entry into force of the Treaty of Lisbon 2009, the Council challenged all aspect of the new international treaty-making procedure in Article 218 TFEU. In all of these cases the Council sought to preserve, to greatest possible extent, intergovernmental nature of the decision making in EU foreign relations, which is a configuration that maximises influence of individual Member States. Although in many of these case the Council was unsuccessful, the number of actions pursued is a significant manifestation that the Member States are dissatisfied with the increasing supranationalisation of the CCP and in the future could obstruct further progress of integration in this area.

The reaction of the Member States to the amendments introduced in the Treaty of Lisbon 2009 could be fuelled by their fear of a further loss of competences in other areas of EU activity such as CFSP. Although, this highly sensitive sphere has preserved its intergovernmental character, the new consolidated procedure for conclusion of international treaties by the EU means that the old pillar structure no longer insulates CFSP from spillover forces. This could increase feelings of sovereignty consciousness among the Member States, who may fear that what is disguised behind the quest for coherence in EU external relations, are demands for more competence from the Union. Member States' hostile attitude affect the entire sphere of external action and causes also spillback in the process of integration in the CCP.

Council's institutional objective of trying to preserve high level of Member States' influence in this area of the Union's action was also visible in the negotiations on the legislative framework for the implementation of the EU investment policy. In this context the Council displayed strong bargaining power and prevented the Commission and the European Parliament from creating functional structures that would have maximised the

pressure for further integration in the CCP. As a result, the Member States maintain high levels of flexibility and control to continue expanding their BIT networks, which undermines the Commission's objective of trying to replace them as international actors in the field of international investment.

The dissatisfaction of the Member States with the enhanced supranational character of the EU external actions add strong countervailing forces to the dialectical process of integration and as demonstrated in the legislative trilogue the bargaining powers of the Council exceed those of the Commission and the European Parliament. Although the Council's contribution to development of the common investment policy have had the effects of delaying the Commission's reform from taking the effect the action of the EU continues in the field, which creates opportunity for the Commission and the European Parliament cultivate further pro-integrative pressures.

***Impact of the Court of Justice of the European Union on the Development of the EU Investment Policy and on the Process of Integration in the CCP post-Lisbon.***

Actions of the Council slowed down the development of the common investment policy, but did not limit the Union's action in the field. The powers to do so, however, possesses the CJEU and its strongly pluralistic approach towards international law and external courts and tribunals presents itself as the major obstacle on the way of successful entry into force of the EU's investment treaties.

The Court is one of the main actors in the process of integration and in the past it had used broad powers that were conferred upon in the Treaty by the Member States to add another functional dimension to the process of integration.<sup>21</sup> The early case law of the CJEU has been essential in ensuring continuous transfer of competences from the Member States to the EU.

However, a different imagine of the Court has emerged in relation to the common investment policy. In this context, as evaluated in Chapter 6, the past case law and the recent Opinion 2/15 indicate that any investor-state dispute resolution system in EU investment agreements could be considered incompatible with EU law. Such a ruling would be a major obstacle on a way towards the EU investment policy succeeding BIT programmes of the Member States.

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<sup>21</sup> Stone-Sweet (n 3); Burley and Mattli (n 3).

The Courts attitude towards external courts and tribunals can be justified on the basis of its role in the process of integration. As the constitutional doctrines ensure integrity of the EU legal order, they must be protected from any external threats. To achieve this objective the Court has put itself in a position of the ultimate guardian of the autonomy of EU law and allows international law norms to permeate the EU legal order only within narrowly defined parameters that ensure their compatibility with core principles of EU law.

In this context the Court has enjoys a wide discretion to find any court as incompatible with EU law, which it has recently exercised to reject the jurisdiction of the ECtHR. This raises uncertainty about the future of investor-state dispute resolution mechanism in EU Treaties. In the Opinion 2/15, the CJEU has given subtly implied that its future reasoning on this matter may follow arguments in Opinion 1/09, which prevent not only Investment Court System in CETA , but also Multilateral Investment Court from ever taking shape.

Currently, pending Opinion 1/17 will confirm the role of the Court in the process of expansion of the CCP after the entry into force of the Treaty of Lisbon 2009, but for now, it is considered in this PhD as a source of countervailing force with the ultimate power to establish limits to the integration in the CCP.

### ***The Overall Summary of the Interinstitutional Dynamics since the Entry into Force of the Treaty of Lisbon 2009***

The Treaty of Lisbon created conditions for further integration in the CCP, however, based on its past evolution the process is likely to take time. Although the functional structures enable the Commission to cultivate pro-integrative pressures, strong countervailing forces are likely to either significantly prolong or hinder the process of the EU obtaining exclusive investment competence. As the Court no longer acts in an activist manner with respect to the scope of the CCP, it has been up to the Commission and the European Parliament to persuade the Member States to shift their loyalties to the supranational centre.

Although the Commission's continued action on the international scene in the field of investment creates a positive pressure for further transfer of competences, its efforts to replace the Member States' BIT programmes fuel feeling of sovereignty consciousness, which are countervailing forces in the process. Despite the fact that the Commission's strategy to establish a multilateral system for protection of international investment with

an institutionalised dispute resolution mechanism could create strong exogenous pressure for further integration in the CCP, this is a very risky plan that will take many years to implement. At the moment, there is not consensus among the 28 EU Member States with regards to substantive and procedural rule in the EU's investment agreement, achieving compromise at an international forum could prove even more difficult.

The European Parliament has emerged as an ally of the Commission and supported the reforms introduced in the EU investment treaties. This has been an important contribution that strengthened the integrative pressures by legitimise actions of the Commission. Nonetheless, the Parliament's position in the CCP remains weak, which was manifested in the trilogues on the legislative frameworks for the implementation of the CCP. Moreover, the existing tension with the national parliaments undermines the effectiveness of the EU external action in the field.

The Council's is the main source of countervailing forces in the development of the common investment policy. To date, the Council's main aim in relation to the common investment policy has been to maximise control of the Member States over its development. In this regards, the power of the Member States is ensured through the use of the mixed procedure for conclusion of EU investment treaties and has been recently utilised to delay the first chapter containing Commission's reform from taking effect. The Member States' refusal of provisional application of investment chapter in CETA undermines the credibility of the EU as an actor in international investment. Although actions of the Council work in the opposite direction to those of the Commission and the Parliament, they do not preclude further development of the CCP.

This, however, could be an effect of the CJEU finding that investor-state dispute resolution system is incompatible with EU law. Contrary to the traditional neofunctionalist depiction, the CJEU has emerged, in this analysis as a source of countervailing forces in the development of the common investment policy and future integration in the CCP. As evaluated in Chapter 6, there is a high probability that the Court will find both Investment Court System and Multilateral Investment Court incompatible with EU law, such a ruling could mark the end of the development of the common investment policy in the traditional sense and postpone any further transfer of competences in this area to the EU.

In the overall summary, it has been argued in this PhD that although the EU is on the path towards further expansion of the scope of the CCP, continued transfer of competences from the Member States should not be taken for granted. The future progress of integration in the area depends on the outcome of interinstitutional conflict concerning common investment policy and currently the countervailing forces prevail in this dialectical process.

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