

### Briefing Note

# 01

## From Rome to Lisbon: a guide to the EU and its role in developing trade and investment agreements

AUTHORS: Judith Neyer and Deborah Lambert-Perez



Posters for the Irish Lisbon Treaty referendum, Dublin. Image: Jnestorius

Whilst the European Union (EU) has no overall investment policy, it pursues an investment strategy by, among other things, including investment provisions in the trade agreements it concludes with third countries. These provisions aim to liberalise investments and are controversial, mainly because they do not include environmental or social safeguards.

This guide describes the players negotiating at the EU level and outlines the history of EU investment discussions. It shows that, while the Commission has been demanding more control over investment decisions, Member States have been reluctant to give it more power. One effect of ratifying the “Lisbon Treaty” would be that Foreign Direct Investments (FDI) would eventually be brought under the Commission’s mandate with the Parliament (EP) having slightly more power to monitor negotiations.

## Introduction

Although a great deal of study has been devoted to EU trade agreements, to date very few non-governmental organisations (NGOs) have concentrated on the EU's investment strategy. For example, the decision-making mechanisms it uses to negotiate investment provisions included in a trade agreement remain largely unknown. This briefing bridges this gap and provides an overview of the EU institutions involved in negotiating investment provisions.

Section one outlines what trade and investment agreements are, their history and the players involved. Section two outlines how the EU's investment strategy and policies push for investment liberalisation. Section three details the different areas of competence and mandates of the European Commission, the Parliament, the Council and the European Court of Justice. The last section examines what might happen in the future if the Lisbon Treaty is adopted.

## SECTION ONE

### What are trade and investment agreements?

#### 1.1 Investment liberalisation and the explosion of trade and investment agreements

There has been a perceived need for an international organisation to regulate trade and preserve foreign direct investment (FDI) against protection measures from host countries since the end of the World War II.<sup>1</sup> However, all attempts to come up with a binding global agreement to assure an international minimum standard of treatment to protect FDI have failed (see box 1). One of the main reasons for this failure is opposition by developing countries. Since 1991, with a global agreement still unsigned, Bilateral Investment Treaties (BITs) and other agreements have proliferated. While fewer than 400 BITs were concluded in the 30 years from 1959 to 1989, more than 2,500 were signed between 1991 and 2000<sup>2</sup> (see figure 1).

### Terminology

**Foreign direct investment (FDI)** is a type of international investment in which an enterprise based in one country (the **direct investor**) acquires an interest of at least 10 per cent in an enterprise based in another country (the **host country**). Investment may take place through the establishment of an entirely new firm, or via a **merger or an acquisition (M&A)**. Because FDI gives investors strategic market access, developed countries have been pushing for **investment liberalisation** to allow them to gain access more easily.

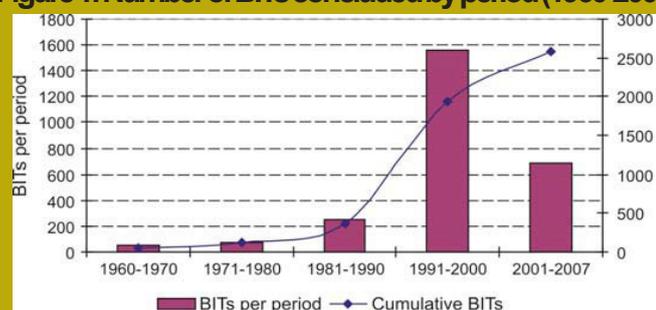
In basic terms, **investment liberalisation** calls for the reduction of restrictions on the entry – admission, establishment, ownership and control – of foreign companies.<sup>3</sup> It consists of reducing government regulations and interventions such as taxes, promoting market supervision and building standards of treatment.

**Bilateral Investment Treaties (BITs)** are agreements signed between individual states or states and regions. They protect investors by including guarantees for fair and equitable treatment, protection from expropriation and free transfer of means such as funds, capital and payments. Most BITs include state-to-state and investor-to-state dispute resolution mechanisms. They do not aim to regulate the admission of foreign investors, but give rights to investors once the investment has been made.

**Free Trade Agreements (FTAs)** are trade pacts that often include investment provisions and aim to create a free trade area between the parties. A free trade area aims to eliminate tariffs, quotas and preferences on goods and services traded between the countries.

**The General Agreement on Trade in Services (GATS)** is the treaty of the World Trade Organisation that extended the multilateral trading system to the service sector. **Mode 3**<sup>4</sup> of the agreement is particularly important because it refers to the provision of services via the establishment of a commercial presence and therefore regulates foreign investment in the services sector.

Two different methods of voting can apply when an EU Member State ratifies an agreement. The **unanimity principle** means that all parties must agree. Concretely, even if there is a majority, a Member State can block a resolution. This voting rule leads to the adoption of the lowest common denominator among Member States. Under **Qualified Majority Voting**, each Member State is given a certain number of votes in the Council, weighted according to size and population. A single Member State cannot block an agreement, although the combined voting power of several Member States can.

**Figure 1: Number of BITs concluded by period (1960-2007)**

Source: UNCTAD

## 1.2 Current trends

It is important to underline that in the absence of a global agreement, thousands of individual agreements have been made. This means that different kinds of investment treaties – from bilateral to multilateral – coexist at various levels and often overlap. Moreover, these treaties cover not only investment issues, but extend to matters such as trade, services, intellectual property, industrial policies, labour issues, movement of personnel, environmental concerns and other matters.<sup>5</sup>

Indeed, with the growing recognition of the connection between trade and investment, an important development has been the surge of investment provisions within free trade agreements (FTAs). In addition to containing a range of trade liberalisation provisions, these agreements include commitments to liberalise and promote investment flows between the parties involved. Developing countries, too, are becoming more and more active in investment liberalisation and are now concluding numerous south-south agreements.

At a global level, more than 80 per cent of FDI inflows are now mergers and acquisitions (M&A), which increasingly take place in the services sector.<sup>6</sup>

Foreign investment in the services sector represents more than half of total volume of FDI. In developing countries too, M&As are increasing, representing 42 per cent of the FDI inflows in 2001, compared to 13 per cent in 1991.<sup>7</sup> Significantly, FDI in developing countries now overshadows all other capital flows: it was ten times larger than overseas development assistance (ODA) and export credits in 2000.<sup>8</sup>

## 1.3 The controversies behind investment liberalisation

The main, although simplified, criticism of investment liberalisation is that it creates more rights and powers for foreign investors – particularly the transnational corporations that dominate the global economy. Transnational corporations are such big players that they are closely involved with fundamental issues concerning control of essential national services and resources. Because of this, foreign investment is a much more politically sensitive subject than trade. Through BITs, corporations seek binding, enforceable rights that will serve the economic policy objectives of their home countries, while limiting the capacity of host countries to adopt investment policies that suit their development strategies.<sup>9</sup> Importantly, BITs give investors enforceable rights to avoid host-country domestic courts and take disputes directly to international arbitration, often through the International Centre for the Settlement of Investment Disputes (ICSID). International arbitration is a controversial issue, notably because many of the disputes have been brought by corporations that have taken over provision of privatised services, such as water.<sup>10</sup>

Above all, FDI has been considered by most governments to be the best way to promote economic and social development in developing countries. Despite this, academic literature finds no compelling evidence of a direct link between FDI and development; instead they conclude that many factors play a role.<sup>11</sup>

### Box 1: Important dates

**1947:** The General Agreement on Tariffs and Trade (GATT), a set of rules that aims to reduce barriers to international trade, is signed by 23 countries.

**1986:** The Uruguay Round negotiations begin, leading to the creation of the World Trade Organisation (WTO) in 1993.

**1995:** The General Agreement on Trade in Services (GATS), a treaty of the WTO, is created to extend the multilateral trading system to the service sector.

**1998:** The Multilateral Agreement on Investment (MAI) is rejected at the Organisation for Economic Cooperation and Development (OECD).

**2001:** The WTO's Doha Round of negotiations begins.

**2003:** The Doha Round of negotiations fails in Cancun and investment is excluded from negotiations.

**2007:** Following the rejection of the European Constitution, the Lisbon Treaty is signed in Lisbon in December.



Farmers mobilising in Ouagadougou against the EU-West Africa EPA, on 1 June 2007. ("No EPA without food sovereignty"). Image: abcBurkina.

## Key Players

**World Trade Organisation (WTO):** This international organisation regulates international trade and consists of 153 government members and 31 observers. The WTO agreements are based on the principle of nondiscriminatory treatment between countries. Each Ministerial Conference corresponds to a new round of negotiations.

**Organisation for Economic Co-operation and Development (OECD):** This international organisation numbers 30 countries among its members. Its agreements regulate, among others issues, member's foreign investment policies. Agreements under the OECD include the Code of Liberalisation of Capital Movements, the Code of Liberalisation of Current Invisible Operations and the Declaration on International Investment of Multinational Enterprises.

**The International Centre for the Settlement of Investment Disputes (ICSID):** This section of the World Bank is the main institution for resolving disputes between foreign investors and the countries in which they have invested. One of the strongest criticisms of ICSID is that its proceedings are secret. Access to documents is not permitted to anyone other than the parties involved.<sup>12</sup>

**The European Union:** The Union is a significant force in investment. The first bilateral treaties addressing investment issues were concluded by European states in the 1960s. In 2007, the European Union accounted for 57 per cent of world FDI outflows, of which 99 per cent came from EU15.<sup>13</sup> Of the 222 regional trade agreements registered at the WTO and currently in force, more than half include the EU or its members (it should be noted that most of these are internal EU agreements or agreements with neighbouring countries).<sup>14</sup>

## SECTION TWO

### EU investment strategy and policies: pushing for investment liberalisation

#### 2.1 The EU's investment 'policy'

Although the EU is one of the world's biggest investors and most advanced economic regional groupings, it has, as such, no foreign investment policy. This does not mean however that it does not pursue an investment strategy. This strategy is integrated in the EU's trade policy, known as the "Common Commercial Policy". The EU pursues its policy objectives through the FTAs it negotiates with other countries or regional blocs, which now increasingly involve provisions in areas such as investment or intellectual property.

Currently, the focus of the EU FDI strategy is on the negotiation of investment rules in the context of the trade agreements that the EU negotiates with third countries. For example, the FTAs that the EU is currently negotiating with India, Korea, Central America and the Andean Community all contain proposals for investment provisions. The EU is also pursuing investment protection and liberalisation under the framework of the Economic Partnership Agreements (EPAs), which it negotiates with six separate regions of the African, Caribbean and Pacific (ACP) group of states.

At the international level, the EU has been the "most aggressive and persistent"<sup>15</sup> advocate of both a 'deep' international trade agenda and a regulatory framework on competition, investment, government procurement and trade facilitation within the WTO. This is important because, due to its large internal market and experience with internal market regulation, the EU wields real power in international trade negotiations. For example, EU approaches are often used as a starting point in WTO negotiations.<sup>16</sup> The EU's Global Europe competitiveness strategy<sup>17</sup> shows how far it is willing to liberalise its own market, and even its bilateral agreements are designed to be 'WTO-plus' compatible.<sup>18</sup> WTO-plus provisions are more stringent than the existing requirements of the WTO Multilateral Trade Agreements.

## SECTION THREE

### Jurisdiction and mandates of EU institutions on trade and investment issues

The Commission's jurisdiction to act and make decisions is known as its competence. Within this definition, trade is known as a Community-exclusive competence. This means that the decision to "legislate and adopt legally binding acts" can only be made at the Brussels level. In other words, the Commission implements EU trade policy on behalf of Member States. The Commission's mandate is supposed to be outlined in the trade provisions of the EC Treaty (Articles 113 - 133), but in reality, there is no clear explanation, nor a definition of the Common Commercial Policy and so the Commission's mandate remains unclear (see box 3).

When it comes to international investment policy, the European Community has 'non-exclusive' competence, meaning that investment remains largely under national authority and responsibility for foreign investment policy is shared between the Commission and individual Member States. Therefore, even when the Commission spearheads trade negotiations that include investment provisions, each Member State must sign off on the final version before those agreements can enter into force.<sup>19</sup> Indeed, these deals are essentially 'mixed agreements' that contain investment provisions falling under the legal domain of Member States – therefore requiring the approval of national-level governments – and other provisions that fall within the

exclusive competence of the European Commission. Recently though, because of the increasing inclusion of investment issues in the EU trade agreements, this separation of power and the exact dividing line have become less clear.

The question of who has trade-related competence is an issue that arises frequently. The European Community is seeking a broader mandate for negotiating trade deals, to include trade-related issues such as services, investments and intellectual property rights.<sup>20</sup> Member States however, especially the larger ones, are reluctant to cede their mandate.<sup>21</sup> The shared responsibility over FDI has also been a source of some tension. For instance, during the WTO's Uruguay Round of negotiations, the Commission asked for competence to negotiate on behalf of Member States on non-goods trade, including investment. This met with resistance from EU member governments and the European Court of Justice eventually held that the Commission did not hold exclusive competence over FDI policy.<sup>22</sup>

In practice, the European Commission negotiates trade agreements and represents European interests on behalf of the Union's 27 Member States. The legal basis for the EU's trade policy is Article 133 of the European Community Treaty (see box 3). As it has received the mandate from the Member States, the European Commission negotiates and regularly consults a special advisory committee consisting of officials from the ministries of Member States - the Article 133 Committee. Once negotiations are completed, the Council gives the Commission the mandate to sign an agreement, and then the Member States' ratification procedure starts.



Mobilisation between Korean and European activists was organised in Brussels on 17 September 2007, to stand up against the EU-Korea FTA talks taking place there.

Image: Friends of the Earth Europe

### Box 3 Key mentions of trade and investment in EC Treaties

The trade provisions in the EC treaty appear in Articles 113 - 133. Although the Treaty came into force in 1958, the scope of the Common Commercial Policy has already changed several times to adapt to the new realities of international trade and economic relations. Although it is difficult to distinguish particular mandates from the text, the following provisions are of interest:

**Article 131** outlines that the EU's aim in establishing global trade agreements is "to contribute in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and the lowering of customs barriers."

**Article 133** is the legal basis for the EU's trade policy, and outlines the role of the main EU players. It states that "the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Community policies and rules. The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee on the progress of negotiations. [...] the Council shall act by a qualified majority. [...] An agreement may not be concluded by the Council if it includes provisions which would go beyond the Community's internal powers, [...] the negotiation of such agreements shall require the common accord of the Member States. Agreements thus negotiated shall be concluded jointly by the Community and the Member States."

**The Amsterdam Treaty (Article 133.5)** was signed in 1997. It modified Article 133 to grant the Community the power to negotiate agreements on service and intellectual property, but only on the basis of unanimity. It also gave the Council the power to grant the European Commission full competence in all external trade policy if all members of the Council agree unanimously.

**The Treaty of Nice** was signed in 2001. It further tilted the balance of power towards the Commission, increasing its competence and fundamentally reforming provisions of the trade policy. The European Community's competence was extended to some services and trade-related aspects of intellectual property rights. Importantly however, investment remained within national competence. Although Community competence increased overall under the Treaty of Nice, trade-related decisions are still the subject of unanimity instead of qualified majority voting.

### 3.1 The role of Member States

Member States have the authority to negotiate their own BITs dealing with the protection of their established investments in third countries. When it comes to the Community trade policy, the Member States are represented by their ministerial representative on the General Affairs and External Relation Council (GAERC) (see 3.3 for more details). This means that a Member State cannot, as such, conclude trade agreements because trade is a Commission-exclusive competence. Concerning the trade-related issues, Member States have challenged the definition of the EU Trade policy before the Court of Justice. Member States also play a role through the Article 133 Committee (see 3.3.2 for more details).

### 3.2 The role of the European Commission

Although the European Commission must be given the mandate to start FTA negotiations at the EU level by the European Council, this is usually granted if related to market access negotiations, but not if the subject is investment protection. In recent years, internal EC papers and proposals tabled during negotiations seem to show a more aggressive push by the EU to have issues related to investment included in the Commission's mandate.<sup>23</sup> The role of some of the Commission's key departments are outlined below.

### 3.2.1 Directorate General for Trade (DG Trade)

DG Trade is responsible for negotiating trade agreements with or without investment provisions. It is also “responsible for ensuring compliance by third countries over international trade agreements”.<sup>24</sup> DG Trade negotiates on behalf of the Community and the Member States, which are consulted during negotiations at the Article 133 Committee.

Since 1999, DG Trade has used Sustainability Impact Assessments (SIAs) to analyse the economic, environmental and social impact of trade agreements. According to DG Trade “[the] SIA process must be carried out without disrupting the negotiation process”.<sup>25</sup> According to the literature, these studies seem to have a very limited impact on the actual conduct of the negotiations and are viewed more as a formality.<sup>26</sup>

On its website, DG Trade outlines the EU’s position on investment very clearly: “The EU considers FDI as a key means to promote development and economic and social growth.” The site goes on to say that international rules on FDI are vital to improve the business climate “by increasing legal certainty for investors and reducing the perception of risk to invest” and states that “we should find ways to strengthen rules in areas such as investment and competition.”<sup>27</sup> In fact, DG Trade even mentions a ‘European investment policy’ but clarifies that the regulatory framework for Europe’s foreign investment lies elsewhere: “The European policy on investment develops in consistency with existing international rules that are most relevant to this area, i.e. the WTO General Agreement on Trade in Services (GATS), the Guidelines for Multinational Enterprises developed in the OECD framework, and other OECD instruments. It also seeks to complement the bilateral investment treaties concluded by Member States.”<sup>28</sup>

### 3.2.2 Other Directorate Generals

DG Enterprise and Industry’s role is to preserve European business interests and competitiveness.<sup>29</sup> It participates in FTA negotiations (as well as in multilateral negotiation, such as the WTO/Doha Development Round and WTO Accession negotiations) and follows the implementation of existing trade agreements.

DG External Relations (RELEX) administers Commission delegations in third countries. “Delegations exercise powers, conferred by the Treaty on the European Community, in third countries and at five centres of international organisations (OECD, OSCE, UN, WTO, FAO), by promoting the Community’s interests as embodied in the common policies, notably the common trade policy.”<sup>30</sup>

DG Competition deals, among other things, with international mergers and acquisitions and prevents companies doing business in the EU if this would distort competition in the European market. Indeed, “Free trade agreements usually contain basic provisions on cooperation in competition matters”.<sup>31</sup> International cooperation on competition policy in bilateral agreements falls within its mandate. DG Competition discusses competition issues in multilateral forums such as the WTO. However, their influence on both DG Trade or the Member States’ conduct of negotiations surrounding investment provisions in trade agreements remains unclear.

## 3.3 The role of the Council of the European Union

The European Council has the authority to ask the European Commission to commence FTA negotiations. The role of more specific bodies is outlined below.

### 3.3.1 The General Affairs and External Relation Council

The General Affairs and External Relation Council (GAERC) meets once a month. Each of the 27 Member States is usually represented by their foreign minister although other ministers can also participate.

The Council is the decision-maker regarding external trade matters. It issues ‘directives for negotiation’ to guide the Commission in its work, and ultimately decides whether to adopt an accord. Agreements on trade in goods, services and intellectual property are made under qualified majority rule. However, the principle of ‘shared competence’ applies for some areas, including investment. Therefore any agreement on investment requires the unanimous approval of Member States, tipping the balance of power concerning external trade and investment in their favour.

### 3.3.2 The Article 133 Committee

In all negotiations on external trade (and investment), the Commission is guided by and reports to a consultative trade policy Committee of the Council, the ‘Article 133 Committee’ (see box 3). The Committee is technically a working group of the Council, composed of representatives from each Member State and chaired by whichever Member State holds the EU Presidency. It meets every week. The Commission is also represented, usually through the head of the WTO unit and the Director-General for Trade.<sup>32</sup> The main functions of the Committee are to coordinate the EU’s trade policy and to oversee the preliminary review of

relevant trade policy proposals to the Commission. It should serve as the Council's watchdog over the Commission's conduct on trade negotiations. Literature highlights however that there should also be close interaction between Commission and Article 133 Committee officials.<sup>33</sup> In the yet-to-be-ratified Lisbon Treaty, the equivalent would be Article 188n.

### 3.4 The role of the European Parliament

The Treaty grants a very limited role to the European Parliament (EP) in terms of trade policy. Under the current treaty, the assent of the EP may be required for major treaty ratifications involving more than trade and issues covered by the Single Market.<sup>34</sup> Essentially, this means that the EP has no explicit power regarding the conduct of trade and investment policy and negotiations. However, since the Commission has committed to making trade policy more transparent and accountable, it "informs the EP on a regular basis about developments."<sup>35</sup>

The Commission consults and informs the EP through the Committee on International Trade and, in the case of mixed agreements, the EP and the parliaments of the Member States (as regards to agreements with national competence) may have to ratify the free trade agreement.

In practice, Members of the EP join the Commission during WTO negotiations even though the Commission is not legally obliged to take their views into account. Although the formal role of the EP remains limited, it can make its voice heard through hearings, reports, resolutions and parliamentary questions. If necessary, the Commission can also ask it to be involved.<sup>36</sup> If a trade agreement covers Single Market issues, the EP also has a role in ratifying the agreement.<sup>37</sup>

Within the EP, two committees are involved in monitoring matters relating to liberalisation in trade agreements. In principle, this investment liberalisation is dealt with by the International Trade Committee<sup>38</sup> (INTA Committee), which also sometimes works with the Committee on Foreign Affairs<sup>39</sup> (AFET Committee). The AFET Committee drafts opinions and suggestions for the INTA Committee, for instance, when it wants the INTA Committee to incorporate suggestions in its motion for a resolution.

#### 3.4.1 The ACP-EU Joint Parliamentary Assembly

This joint institution was created within the framework of the Cotonou Agreement<sup>40</sup> (Article 17) to bring together representatives of the European Community and of the ACP countries. It is a consultative body that can adopt resolutions and make recommendations to the Council. Within the assembly, three standing committees were created in 2003.<sup>41</sup> They can draft proposals, which are then voted on by the Joint Parliamentary Assembly. For instance, the standing committee on Economic Development, Finance and Trade produced a report on the Impact of FDI in the ACP States, which was adopted as a resolution in Kigali in November 2007.

The Assembly can ask oral questions to the Council and to the Commission, and responses can be accessed online.

#### 3.5 The role of the European Court of Justice

The European Court of Justice (ECJ) has been called upon to define the competence of the Commission regarding trade-related issues. When asked to rule, the ECJ has emphasised that investment agreements with third countries are primarily the responsibility of Member States.<sup>42</sup>

The ECJ also deals with disputes relating to investment. For instance, recently the European Commission brought disputes before the Court concerning Finland, Austria and Sweden's refusals to re-negotiate their BITs. According to the Commission, some of the provisions regarding the right of foreign investors to move capital freely would be incompatible with the European Community's right to restrict capital flows in extraordinary circumstances.<sup>43</sup> The ECJ has ruled<sup>44</sup> that certain clauses in Sweden and Austria's bilateral investment treaties are incompatible with the European Community (EC) Treaty.

## SECTION FOUR

### What Lisbon might bring...

Signed in Lisbon in December 2007 but not yet ratified by all Member States, the proposed Lisbon Treaty would amend the Treaty on European Union and the Treaty establishing the European Community. It is also known as the Reform Treaty and is a revised version of the European Constitution, signed in 2004 but rejected by France and Netherlands through referendum.

This Reform Treaty would make all matters concerning external commercial policy the exclusive competence of the European Community. It would also further extend the Common Commercial Policy to explicitly apply to services, protection of intellectual property rights and FDI. Member States would therefore lose the mandate to conclude FDI agreements and there will be no more mixed trade agreements concluded by both the EU and the Member States.

“The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade, such as those to be taken in the event of dumping or subsidies” (Article III-315).

The qualified majority rule will remain the voting rule in the Council, although unanimity will be required in some cases, FDI included. The below quote shows, however, that in practice, the decision-making process will not change.

“For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules” (Article III-315).

The Lisbon Treaty creates an international legal personality:

“The Union shall have legal personality” (Article 47).<sup>45</sup>

It means that the Union’s personality will be “separate from and superior to its Member States, so that it could act as a sovereign



state in the international community of states, sign treaties with other nations in all areas of its powers, have its own political president, foreign minister (High Representative), diplomatic service, embassies and public prosecutor”.<sup>46</sup>

According to the Lisbon Treaty, the EP and the Council will be co-legislators in determining the framework for implementing the Common Commercial Policy. The EP will have increased powers with regard to the final text of an FTA as it would be granted ‘co-decision’ power with the Council on the adoption of the negotiated text for most trade-related areas, including FDI. The EP would also have an amplified role in ratifying trade agreements: i.e. the power to consent, by a simple parliamentary majority, to the final adoption of trade agreements. In practice though, negotiations will proceed much as before. The Commission, as is currently the case, would be required only to keep Parliament informed<sup>47</sup> about the progress of negotiations, and the EP would still have no power to authorise the instigation of trade negotiations. For example, authorising the mandate and negotiation of international (extra-EU) agreements is specifically excluded.

Rather than clarifying the situation, the Lisbon Treaty may add more uncertainty to the question of who holds the power to conclude international investment agreements. Ultimately the ECJ will be called upon to provide clarification.

## Conclusion

The EU has been a strong advocate of liberalising investments with the aim of opening markets, especially Southern ones, to European multinational companies. This would have a huge negative effect on developing countries' economies. Although the EU's trade policy is the most integrated (dealt with by Member States, the Commission, the Council and the EP) of the Union, each player's scope is quite opaque. Although trade is a Community-exclusive competence, for example, the Commission's mandate remains unclear, especially when it comes to FDI.

What is known about the process of negotiating trade and investment agreements is that the Council gives the Commission the mandate to initiate the agreement negotiations, DG Trade negotiates it on the behalf of the 27 Member States and informs the EP. The Article 133 Committee is the Council's special advisory committee, in charge of monitoring the negotiations,

although it seems that the Commission retains control of the decision-making process. At the end of a successful negotiation, the Council gives the Commission the mandate to sign the negotiated agreement, and then Member States are asked to ratify it.

This is the present situation, but the Commission has been pushing to obtain full competence and more negotiating power over trade-related issues. If the Lisbon Treaty is ratified, the Commission will gain this competence, FDI will be included in the scope of the Common Commercial Policy and the Member States will lose the mandate to conclude BITs. However trade-related decisions will still be subject to unanimity voting rule, which will temper the Commission's power to negotiate investment provisions, as any agreement could be blocked by even one Member State.

## Endnotes

1. International Investment rule-making: stocktaking, challenges and the way forward, UNCTAD Series on International Investment Policies for Development, 2007/3
2. Ibid.
3. Ibid.
4. Mode 3 of the General Agreement on Trade in Services refers to "the supply of a service by a service supplier of one Member, through commercial presence in the territory of any other Member," Article 1:2(c).
5. International Investment rule-making: stocktaking, challenges and the way forward, UNCTAD Series on International Investment Policies for Development, 2007/3
6. "A multilateral framework for investment?" Bruno Ferrarini (in *The Singapore Issues and the World Trading System: The Road to Cancùn and Beyond*)
7. Ibid.
8. Ibid.
9. Kavaljit K. Singh, op. cit., pp. 91, 94
10. bilaterals.org at [www.bilaterals.org/rubrique.php?id\\_rubrique=35](http://www.bilaterals.org/rubrique.php?id_rubrique=35)
11. "Is foreign investment good for development? A literature review," SOMO Paper, March 2008
12. The European Union and the New Trade Politics, Young and Peterson, 2006, p. 796, pp. 804-5
13. Europe's Global Role, External Policies of the EU, Jan Orbie, 2008
14. [http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc\\_130376.pdf](http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130376.pdf)
15. "We always use bilateral free trade agreements to move things beyond WTO standards. By definition, a bilateral trade agreement is "WTO plus". Whether it is about investment, intellectual property rights, tariff structure, or trade instrument, in each bilateral free trade agreement we have the "WTO plus" provision." (Pascal Lamy, Jakarta Post, 9 September 2004)
16. <http://www.brettonwoodsproject.org/art-236015>
17. Background Paper: Investment Liberalisation in the EU-ASEAN FTA, Ignacio Jose Minambres for Focus on Global South, February 2009
18. Ibid.
19. "European treaty may revive debate over power to conclude investment agreements," Investment Treaty News, 31 October 2007
20. In a note for the Article 133 Committee, DG Trade proposed a 'minimum platform' for investment that would broaden its authority to negotiate international investment agreements with non-EU countries. See "European Governments remain split over extent of investment provisions in EU FTAs," Damon Vis-Dunbar, Investment Treaty News, March 16, 2007
21. Europe's Global Role, External Policies of the EU, Jan Orbie, 2008
22. "EU Governments Debate Euro Commission's Investment Negotiating Ideas," Damon Vis-Dunbar and Luke Eric Peterson, Investment Treaty News, November 15, 2006
23. Background Paper: Investment Liberalisation in the EU-ASEAN FTA, Ignacio Jose Minambres for Focus on Global South, February 2009
24. [http://ec.europa.eu/economy\\_finance/eu\\_economic\\_situation/globalisation227\\_en.htm](http://ec.europa.eu/economy_finance/eu_economic_situation/globalisation227_en.htm)
25. European Commission 2002, The report on Trade, Environment and Sustainability Impact Assessment, Concerted Action on Trade and Environment
26. See for instance "EU Trade Politics: Pursuit of Neo-Mercantilism in Different Fora?", Raza, 2007
27. DG Trade website: [http://ec.europa.eu/trade/issues/sectoral/investment/index\\_en.htm](http://ec.europa.eu/trade/issues/sectoral/investment/index_en.htm)
28. Ibid
29. [http://ec.europa.eu/enterprise/international\\_relations/index\\_en.htm](http://ec.europa.eu/enterprise/international_relations/index_en.htm)
30. [http://ec.europa.eu/external\\_relations/delegations/docs/50\\_years\\_brochure\\_en.pdf](http://ec.europa.eu/external_relations/delegations/docs/50_years_brochure_en.pdf)
31. <http://ec.europa.eu/competition/international/bilateral/index.html>
32. DG Trade website: [http://ec.europa.eu/trade/gentools/gloss\\_en.htm](http://ec.europa.eu/trade/gentools/gloss_en.htm)
33. See for instance "European Community Trade Policy and the 133 Committee", Johnson (London: Royal Institute of International Affairs)
34. For instance, "when these have budgetary or institutional implications, when the implementation of the agreement requires a modification of EU legislation determined by co-decision making or when the agreement is an

association agreement with a third country,” The potential impact of the Lisbon Treaty on European Union external trade policy, Stephen Woolcock, London School of Economics

35. DG Trade website: [http://ec.europa.eu/trade/gentools/faqs\\_en.htm](http://ec.europa.eu/trade/gentools/faqs_en.htm)

36. Europe’s Global Role, External Policies of the EU, Jan Orbie, 2008

37. “Strategic mapping of EU influence on global financial regulation,” Myriam Vander Stichele, SOMO, November 2008

38. [www.europarl.europa.eu/activities/committees/homeCom.do?language=EN&body=INTA](http://www.europarl.europa.eu/activities/committees/homeCom.do?language=EN&body=INTA)

39. [www.europarl.europa.eu/activities/committees/homeCom.do?language=EN&body=AFET](http://www.europarl.europa.eu/activities/committees/homeCom.do?language=EN&body=AFET)

40. [http://ec.europa.eu/development/geographical/cotonouintro\\_en.cfm](http://ec.europa.eu/development/geographical/cotonouintro_en.cfm)

41. The three committees are the Committee on Political Affairs, the Committee on Economic Development, Finance and Trade, and the Committee on Social Affairs and the Environment.

42. European treaty may revive debate over power to conclude investment

agreements, By Damon Vis-Dunbar, Investment Treaty News, October 30, 2007

43. “EU Member States reject the call to terminate intra-EU bilateral investment treaties,” Damon Vis-Dunbar, 10 February 2009

44. Case C-205/06 Commission of the European Communities v Republic of Austria, judgment of 3 March 2009; Case C-249/06 Commission of the European Communities v Kingdom of Sweden, judgment of 3 March 2009.

45. For a definition of the legal personality of the Union see [http://europa.eu/scadplus/glossary/union\\_legal\\_personality\\_en.htm](http://europa.eu/scadplus/glossary/union_legal_personality_en.htm)

46. Legal analysis of select provisions of the Lisbon Treaty, European Center for Law and Justice, p.6

47. European Parliament, Committee on International Trade, Draft opinion on Parliament’s new role and responsibilities implementing the Treaty of Lisbon (2008/2063(INI)), 15.04.2008, available at [www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-404.787+01+DOC+PDF+V0//EN&language=EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-404.787+01+DOC+PDF+V0//EN&language=EN)



Peruvian indigenous peoples march to protest the pro-business policies of President Alan Garcia. Image: CEPES

**Published by FERN, the campaigning NGO for greater environmental and social justice, with a focus on forests and forest people’s rights in the policies and practices of the EU.**

1C Fosseway Business Centre  
Stratford Road  
Moreton-in-Marsh, Gloucestershire  
GL56 9NQ UK  
t +44 (0)1608 652 895  
f +44 (0)1608 652 878

26 Rue d’Edimbourg  
B-1050 Brussels  
Belgium  
t +32 (0)2 894 4690  
f +32 (0)2 894 4610

e [info@fern.org](mailto:info@fern.org)

For more briefing notes visit <http://www.fern.org>

This briefing note was prepared with the financial assistance of the European Community. The views expressed do not however imply the expression of any opinion on the part of any of the donors. The European Commission is not responsible for any use of the information contained within this briefing note.