Philip Strik

*Shaping the Single European Market in the Field of Foreign Direct Investment.*

When, on 1 December 2009, the Treaty of Lisbon entered into force, Article 207 of the Treaty on the Functioning of the European Union (TFEU) expanded the EU’s Common Commercial Policy (CCP) to include foreign direct investment (FDI). Only a few specialists in international investment law took note. Five years later, the EU still has not exercised its newly gained competence such that an investment treaty with a third State would be in force. Yet it is difficult, if not impossible, to think of any well-informed newspaper or even tabloid that has not, in one way or another, run an article that can be traced back to Article 207 TFEU. What happened?

The EU, or more precisely the European Commission mandated by the European Council and the European Parliament, started negotiating trade agreements, including investment chapters, with numerous third States. The one with Canada (the Comprehensive Economic Trade Agreement or CETA) and the one with the United States (the Transatlantic Trade and Investment Partnership or TTIP) are two prominent examples. What one might have thought to be an unlikely candidate to capture the attention of many politicians in the context of these negotiations is the question about inclusion of what most newspapers describe as an ‘obscure’ clause: an investor-State arbitration clause. As the discussion in different fora unfolded, investor-State dispute settlement (ISDS) quickly became the scapegoat for all that is allegedly wrong with international capitalism: large corporations and financial institutions ‘exploiting’ emerging economies. Investors and States supportive of ISDS appear to have underestimated the power of certain non-governmental organisations (NGOs) in shaping the political debate. It remains unclear whether TTIP will include an ISDS provision. If it does not include such a provision, the (negative) precedent set is likely to be an important one.

When Philip Strik wrote the study which is the subject of this review, largely based on his PhD dissertation which he defended at the University of Cambridge in November 2011 (but which takes developments until end of August 2013 into account), he probably could not foresee that his book would provide important legal groundwork for what is now a contentious political debate. Strik’s study is not the only one in the field. Important previous studies include Steffen Hindelang’s *The Free Movement of Capital and Foreign Direct Investment*¹ and Angelos Dimopoulos’s *EU Foreign Investment*

---
Law. Strik’s study, of course, is the most recent study. It is a welcome addition to a field of law that is rapidly changing.

Strik’s study is not confined to issues arising out of the EU’s newly gained competence under Article 207 TFEU. It is much broader and also deals with the operation of the internal market mechanism in relation to direct investment as well as the on-going debate about the validity and application of bilateral investment treaties (BITs) concluded between EU Member States (so-called ‘intra-EU BITs’). When considering intra-EU BITs, Strik argues that ‘accession has not directly posed a challenge to the continued validity of the BITs that have consequently acquired intra-EU status. In addition, insofar as these agreements raise issues of compatibility with EU law, this does not automatically call into question their continued existence’ (p. 188). In developing his argument on intra-EU BITs Strik first gives a historical overview of intra-EU BITs. Importantly, he argues that the Europe Agreements concluded by the (then) Community and the (to be new) Member States contained provisions on the conclusion of BITs by these countries with the Member States (p. 189). They could thus be seen as complementary to the accession process. This overview is followed by a somewhat lengthy chapter on the EU fundamental right to property and the protection of legitimate expectations in the EU legal order.

Rightly, in the view of this reviewer, Strik then concludes that ‘the EU legal framework governing the interplay between EU law and intra-EU BITs does not affect the validity of these agreements’ (p. 210) such as by operation of Article 59 Vienna Convention on the Law of Treaties (VCLT) because the criteria for the operation of this provision have not been fulfilled.

A further argument which has been advanced by the European Commission and certain Member States against the validity and application of intra-EU BITs is an alleged incompatibility with the principle of equal treatment under EU law. Strik also discusses this argument in the context of Article 59 VCLT, focusing on differences in the scope of investment protection under intra-EU BITs. His analysis concludes that there is an incompatibility with the principle of equal treatment but that this incompatibility does not mean that these intra-EU BITs trigger the application of Article 59 VCLT, thus his analysis does not lead to their being terminated. Instead, he argues, ‘their scope of application needs to be extended to such investors from a “third” Member State’ (p. 236).

The argument on a possible violation of the principle of equal treatment in the context of intra-EU BITs has more often been approached by contrasting the availability of investor-State arbitration for investors from a Member State,

---

2 Angelos Dimopoulos, *EU Foreign Investment Law* (OUP 2011); reviewed by Christoph Schewe (2014) 15 JWIT 333.