

4.5 Member States' Investment Treaties

As far as the *adaptation of bilateral agreements of new Member States* are concerned, the Commission undertook some time ago to facilitate negotiations with the US, Japan and Canada in order to adapt the Bilateral Investment Treaties of accession and candidate countries to Treaty requirements. During the report period only Canada was involved in these activities.

Contacts continued with Canada to finalize a Memorandum of Understanding to replace its Foreign Investment Protection Agreements (BITs) with several new Member States. Like in the earlier Memorandum of Understanding with the US³⁹, most, but not all, potential EU measures have been safeguarded. Moreover, the agreements in question, once replaced, will become post-accession BITs and, as such, will no longer prevail over EC measures. Some of the Member States concerned had further bilateral contacts with Canada with regard to modifications suggested by Canada, but not related to the *acquis* on capital movements. The Memorandum of Understanding shall be signed before end 2006 and the new revised agreements should be signed and ratified subsequently by the parties concerned.

There are still around 150 *BITs between Member States* in force (Annex IV)⁴⁰. There appears to be no need for agreements of this kind in the single market and

³⁹ SEC(2003)926.

⁴⁰ Mostly BITs where new Member States are Contracting Parties. There are only 2 agreements between "old" Member States. Annex III is listing the existing BITs between Member States, as included in the UNCTAD database.

their legal character after accession is not entirely clear. It would appear that most of their content is superseded by Community law upon accession of the respective Member State. However the risk remains that arbitration instances, possibly located outside the EU, proceed with investor-to-state dispute settlement procedures without taking into account that most of the provisions of such BITs have been replaced by provisions of Community law.⁴¹ Investors could try to practise "forum shopping" by submitting claims to BIT arbitration instead of – or additionally to – national courts. This could lead to arbitration taking place without relevant questions of EC law being submitted to the ECJ, with unequal treatment of investors among Member States as a possible outcome.

In order to avoid such legal uncertainties and unnecessary risks for Member States, it is strongly recommended that Member States exchange notes to the effect that such BITs are no longer applicable, and also formally rescind such agreements. The Committee is invited to endorse this approach and Member States are asked to communicate to the Commission by 30 June 2007 which actions have been taken in that regard and which of their intra-EU investment agreements still remain to be terminated.

⁴¹ Such an arbitration procedure is in motion at present.

ANNEX III DIRECT INVESTMENT FLOWS IN EU MEMBER STATES AND IN THE OECD
(EUR billion)

	Outflows						Inflows					
	2000	2001	2002	2003	2004r	2005r	2000	2001	2002	2003	2004r	2005r
Austria	6,2	3,5	6,2	6,3	6,0	7,5	9,6	6,6	0,4	6,3	3,0	7,2
Belgo-Luxembourg	237,0	120,6	:	:	:	:	239,8	108,7	:	:	:	:
Belgium	:	:	13,0	34,5	27,0	21,4	:	:	17,3	29,6	33,9	22,4
Luxembourg	:	:	133,6	88,4	65,8	64,9	:	:	122,3	79,9	62,2	56,8
Cyprus	0,2	0,3	0,5	0,4	0,5	0,3	0,9	1,1	1,1	0,8	0,9	0,9
Czech Republic	0,0	0,2	0,2	0,2	0,8	0,7	5,5	6,3	9,0	1,9	4,0	8,8
Denmark	30,9	14,1	6,6	-0,5	:	6,3	38,8	10,7	5,2	-2,3	:	4,0
Estonia	0,1	0,2	0,1	0,1	0,2	0,5	0,4	0,6	0,3	0,8	0,8	2,2
Finland	26,1	9,4	8,1	-2,4	-0,9	2,2	9,6	4,2	8,4	3,0	2,8	3,7
France	190,5	103,9	53,6	47,1	38,5	79,9	46,6	61,6	52,1	37,7	19,6	40,0
Germany	61,4	44,3	16,1	-3,6	1,5	36,7	215,2	29,5	53,7	23,8	-12,2	26,3
Greece	2,3	0,7	:	:	0,5	0,8	1,2	1,7	:	:	1,1	-0,2
Hungary	0,6	0,4	0,3	1,5	0,9	1,0	1,8	4,4	3,2	1,9	3,8	5,2
Ireland	5,0	4,5	9,0	4,9	14,6	10,9	28,7	10,8	30,8	20,2	-8,5	-25,0
Italy	13,4	24,0	18,3	8,1	15,6	33,4	14,5	16,6	15,5	14,5	13,6	15,7
Latvia	0,0	0,0	0,0	0,0	0,1	0,1	0,4	0,1	0,3	0,3	0,6	0,5
Lithuania	0,0	0,0	0,0	0,0	0,2	0,3	0,4	0,5	0,8	0,2	0,6	0,8
Malta	0,0	0,0	0,0	0,4	0,1	0,0	0,7	0,3	-0,5	0,8	0,4	0,6
Netherlands	82,1	56,5	34,0	39,1	13,9	97,2	69,3	58,0	26,6	19,3	0,4	35,6
Poland	0,0	-0,1	0,2	0,3	0,6	1,2	10,1	6,4	4,4	4,3	10,3	6,6
Portugal	8,8	7,0	0,2	5,8	6,4	0,9	7,2	7,0	1,9	5,8	1,9	2,5
Slovakia	0,0	0,1	0,0	0,0	0,0	0,1	2,3	1,6	4,0	0,6	0,7	1,7
Slovenia	:	0,3	0,2	0,1	0,3	0,5	:	0,3	0,9	1,0	0,6	0,4
Spain	63,2	37,0	34,8	24,4	48,8	31,2	43,0	31,7	41,7	23,0	19,9	18,5
Sweden	:	7,1	:	:	16,9	21,1	21,8	13,3	:	:	10,1	11,0
United Kingdom	253,1	65,7	53,4	58,8	76,3	81,3	128,8	58,8	25,5	18,0	45,2	132,3
Source: EUROSTAT (r) Data subject to revision												
Japan	34,1	42,8	34,1	25,5	24,9	36,8	9,0	7,0	9,7	5,6	6,3	2,3
United States	172,3	158,9	163,5	124,3	196,4	7,3	347,7	186,4	85,5	59,3	107,2	88,3
Other non-EU OECD countries	115,8	82,2	53,0	53,3	84,3	46,9	146,8	91,6	72,4	52,5	66,5	43,8
OECD total	1337,1	763,1	655,1	541,6	629,0	575,6	1392,4	705,3	605,8	411,0	394,9	499,8
Source: OECD (r) Data subject to revision												

ANNEX IV BILATERAL INVESTMENT TREATIES BETWEEN EU MEMBER STATES

	BE/LU	CZ	DK	DE	EE	EL	ES	FR	IE	IT	CY	LV	LT	HU	MT	NL	AT	PL	PT	SL	SK	FI	SE	UK	
BE/LU		x			x						x	x	x	x	x			x		x	x				10
CZ	x		x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	23
DK					x							x	x	x				x		x	x				8
DE		x			x							x	x	x	x			x		x	x				11
EE	x	x	x	x		x	x	x		x		x	x	x		x	x	x			x	x	x	x	18
EL		x			x						x	x	x	x				x		x	x				10
ES		x			x							x	x	x				x		x	x				8
FR		x			x							x	x	x	x			x		x	x				9
IE		x																							1
IT		x			x							x	x	x	x			x		x	x				9
CY	x	x				x								x	x			x							6
LV	x	x	x	x	x	x	x	x		x			x	x		x	x	x	x		x	x	x	x	19
LT	x	x	x	x	x	x	x	x		x				x		x	x	x	x			x	x	x	19
HU	x	x	x	x	x	x	x	x		x	x	x				x	x	x	x	x	x	x	x	x	21
MT	x	x		x				x		x	x						x			x	x		x	x	12
NL		x			x							x	x	x	x			x		x	x				9
AT		x			x							x	x	x	x			x		x	x				9
PL	x	x	x	x	x	x	x	x		x	x	x	x	x		x	x		x	x	x	x	x	x	21
PT		x										x	x	x				x			x				8
SL	x	x	x	x		x	x	x		x			x	x	x	x	x	x	x		x	x	x	x	19
SK	x	x	x	x	x	x	x	x		x		x		x	x	x	x	x	x			x	x	x	20
FI		x			x							x	x	x				x		x	x				8
SE		x			x							x	x	x	x			x		x	x				9
UK		x			x							x	x	x	x			x		x	x				9
	10	23	8	11	18	10	8	9	1	9	6	19	19	21	12	9	9	21	8	19	20	8	9	9	TOTAL 148
	BE/LU	CZ	DK	DE	EE	EL	ES	FR	IE	IT	CY	LV	LT	HU	MT	NL	AT	PL	PT	SL	SK	FI	SE	UK	

Source: UNCTAD, Status 1 June 2005.

Comment: All intra-EU Bits have a new Member State as one of the contracting parties, except the shaded entries.