UDC 339.727.22+339.923:(061.1EU)]:34

Žaklina NOVIČIĆ, Ivona LAĐEVAC[1]

FOREIGN DIRECT INVESTMENT IN THE EUROPEAN UNION LAW AFTER THE LISBON TREATY: EU'S NEW EXCLUSIVE COMPETENCE IN THE COMMON INVESTMENT POLICY

ABSTRACT

Under the Treaty of Lisbon new exclusive competence on foreign direct investment has been conferred to the European institutions. This change will have a number of potentially important implications for decision-making in the EU, as well in the areas of the external trade and investment policy. New competence is affecting on the conclusion of international agreements, the membership status to relevant international organization and the contending party status in a dispute settlement mechanisms regarding foreign direct investment. This article summarizes and discusses the main treaty changes and some key implementing questions regarding foreign direct investment in the EU Law after the Lisbon Treaty.

Key words: foreign direct investment, common commercial policy, external action, EU

JEL Classification: F21, F36, K20

GLOBAL CONTEXT OF FOREIGN DIRECT INVESTMENT

Since the 1930s the world's worst economic crisis was, and still is, the one which erupted in the 2008. This crisis has reversed much of the progress

[1] Žaklina Novičić M.A, Research Associate, IIPE, Belgrade, zaklina@diplomacy.bg.ac.rs; Ivona Lađevac M.A, Research Associate, IIPE, Belgrade, ivona@diplomacy.bg.ac.rs. This paper was created within the project "Serbia and Contemporary World: Perspectives and Ways of Strengthening Foreign-Policy, Security and Foreign-Economic Position of Serbia in Contemporary Processes in International Community", Ministry of Science and Technological Development of the Republic of Serbia, number 149002D, for the period 2006–2010.

achieved in Europe since 2000. In the words of European Commission, "the crisis has wiped out years of economic and social progress and exposed structural weaknesses in Europe's economy".[2] The European GDP fell by 4% in 2009, an industrial production dropped back to the levels of the 1990s and 23 million people – or 10% of EU active population – became unemployed. Public finances in the EU member states have been severely affected, with deficits at 7% of GDP on average and debt levels at over 80% of GDP. Two years of crisis easily erased twenty years of fiscal consolidation. "Our growth potential has been halved during the crisis. Many investment plans, talents and ideas risk going to waste because of uncertainties, sluggish demand and lack of funding". The Commission points that, in the meantime, the world is moving fast and long-term challenges – globalization, pressure on resources, ageing – intensify.[3]

The world's economic and financial crisis had a major impact on the capacity of European businesses and governments to finance investment and innovation projects.[4] Globalization of capital movements, including notably of FDI, has seen a dramatic increase in the years before the crisis. In 2007, FDI flows were at the record height of almost 1.500 billion EUR. According to UNCTAD, in 2009, FDI into EU fell by 28% following a deeper 40% decrease in 2008.[5] This is a reason for concern, although some other countries (USA, for example) experienced a similar decline. What's clear is that the share of developed countries in FDI inflows has fallen significantly relative to the share of developing economies, within a context of shrinking global FDI flows.[6] During the current period of turbulence in the world economy, investments to and from emerging economies have either surged or dropped less dramatically than flows between industrialized countries, and this has translated in an increase of the relative share of emerging economies in global FDI flows, both for inward and outward flows.[7]

The 2008 world economic crisis has endangered EU competitiveness in the global competition to attract and promote investment from and to the other

[2] COM(2010) 2020, *Europe 2020: A strategy for smart, sustainable and inclusive growth*, European Commission, Communication from the Commission, Brussels, 3.3.2010, p. 3. Internet: http://register.consilium.europa.eu/pdf/en/10/st07/st07110.en10.pdf

[3] *Ibidem,* p. 5, p. 3.

[4] *Ibidem,* p. 20.

[5] *World Investment Prospects Survey 2009-2011*, UNCTAD 2009, United Nation Conference on Trade and Development, New York and Geneva, Internet, http://www.unctad.org/en/docs/diaeia20098_en.pdf

[6] José Guimón, "It's time for an EU Investment Promotion Agency", *Columbia FDI Perspective,* Vale Columbia Center on Sustainable International Investment, No. 20, March 4, 2010. See also: Laza Kekic, "The global economic crisis and FDI flows to emerging markets", *Columbia FDI Perspective,* No. 15, October 8, 2009. Internet: http://www.vcc.columbia.edu/

[7] COM(2010)343 final, *Towards a comprehensive European international investment policy,* Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, European Commission, Brussels, 7.7.201, p. 4.

parts of the world. The prospects for near future are also worrisome: only four EU countries appear among the 15 most attractive FDI locations in 2009-2011.[8] The crisis has also made the task of securing future economic growth of the EU much more difficult. The Commission says that "the still fragile situation" of the EU financial system is "holding back recovery as firms and households have difficulties to borrow, spend and invest".[9]

EU member states have proposed and implemented their own answers to the crisis, and the EU institutions also proposed their programs. In that respect, EU bodies and institutions now, after the Lisbon Treaty entered into force, make use of the new exclusive competence on FDI. Namely, one of the most important novelties of the Lisbon Treaty is the inclusion of FDI within the scope of the Common Commercial Policy (CCP), and subsequently the inclusion of the external trade and investment policy (along with foreign and security policy, environment and development policy and humanitarian assistance) in now unified title of European External Action. This implying, first of all, a transfer of certain FDI competences from the member states to the EU, now empowered to concluding international investment treaties, while until now a role of EU institutions was mainly limited in this field. It remains to be seen how the Treaty of Lisbon will be interpreted and implemented in light of the difficult political and legal questions that this novelty raises.

FOREIGN DIRECT INVESTMENT – MAIN TREATY CHANGES

The Treaty of Lisbon (ToL) explicitly brings FDI into exclusive competence of the EU under the Common Commercial Policy (CCP) at Title II of Part Five on External Action of the Treaty on the Functioning of the European Union (TFEU).[10] The aim of this novelty, which Commission having sought since the Treaty of Amsterdam's Intergovernmental Conference in 1996, was to strengthening the EU's negotiating position in the world while preventing disparate member states' policies from undermining the uniformity of the internal market. The ToL brings EU trade and investment policy into unified European external action, so that trade policy is henceforth to be conducted within the context of the framework of principles and objectives of the EU's

[8] *World Investment Prospects Survey 2009-2011*, UNCTAD 2009, op. cit., p. 57 (Table 8).

[9] COM(2010) 2020, op. cit., p. 5.

[10] Articles 205-207 in conjunction with Article 3.1 lit e TFEU. Treaty on the Functioning of the European Union – TFEU replaces the Treaty establishing the European Community – TEC. All references to the Treaty of Lisbon (ToL) articles are according to the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, *Official Journal*, C 83, 30.3.2010, at: http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2010:083:SOM:EN:HTML.

external action.[11] To date EU external trade policy has, of course, served broad foreign policy or strategic objectives, such as through the negotiation of Association Agreements with the EU's near neighbours, etc. The EU has also made use of trade agreements to strengthen relations with specific countries or regions. But trade has been used less in the pursuit of specific short-term foreign policy objectives.

Exclusive competence means that the legal basis for the adoption of agreements will in future be a qualified majority vote in the Council of Ministers. It also means that the consent of the European Parliament by a simple majority of members will in effect replace ratification by national parliaments for this policy area (CCP, including FDI). Non veto power for individual member states under a unanimous voting regime in the Council translates into more effective control for the Commission to implement policies over which it has competence. The external trade-policy representation of the internal market worldwide (CCP) has already been an exclusive area of activity of the European Community according to Community law, but this had not included foreign direct investment, the trade in services and trade related aspects of intellectual property rights (TRIPs). In other words, the European Community did not have competence for FDI; it only had concurrent competence for the trade in services and the TRIPs.[12] To date investment has been an area of mixed competence, in the way that the EC has negotiated agreements covering investment in services, and some other aspects of investment liberalization, but member states have negotiated bilateral investment treaties (BITs) to protect fund repatriation and against unfair or uncompensated expropriation. The ToL now brings services, TRIPs and FDI into EU's exclusive competences.

By now all or almost all member states were bounded to each other by about 200_intra-EU bilateral investment agreements (BITs) and by other different sources of_international law and international organizations dealing with various investment issues. That multiplicity of sources requires the framework for foreign direct investment being assessed on specific legal basis. Namely, the protection of investment under public international law is an independent category of international law for which the context of world trade is only of

[11] Article 205 of the ToL. These include general aims such as support for democracy, rule of law and human rights as well as the slightly more specific aims of sustainable economic, social and environmental development, the integration of all countries into the world economy (including through the progressive abolition of restrictions on international trade), the progressive improvement of the environment and sustainable management of global resources and good global governance (Chapter 1 of Title V of the TEU, Article 21).

[12] The retention of member state competence for FDI has meant that unlike the USA the EU has not included comprehensive investment provisions covering liberalization and investment protection in any preferential trade agreements. Stephen Woolcock, "EU Trade and Investment Policymaking after the Lisbon Treaty", *Intereconomics: Review of European Economic Policy*, 2010, vol. 45, issue 1, page 22.

marginal importance.[13] The institutional independence reflects the differences of opinion on the protection of property on the international level. For decades, far-reaching ideologically motivated differences have existed concerning the sociopolitical importance of the fundamental liberty right to property.[14]

In order to analyze recent treaty novelties in the distribution of competences on FDI, it is necessary to consider multiplicity of sources, heterogeneous and multi-layered groups of norms. The significant extension of the EU competence raises also some other important questions concerning the implementation of the treaty changes.

DEVELOPMENT OF THE EXCLUSIVE COMPETENCE ON FDI AND MAIN CHANGES AFTER LISBON

For many years there has been a debate over the scope of the EC exclusive competence in the field of trade. In the Maastricht, Amsterdam and Nice Intergovernmental Conferences of the EU there were only minor changes made to the treaties, so that services and TRIPs remained mixed competence – part EC and part member state competence. The draft Constitutional Convention favored a simplification and extension of what is now to be called EU competence and this was carried over into the the ToL.

Therefore, even without the ToL and new explicit external competence on FDI, the EU has not been completely excluded from acting in the field of FDI, because the previous treaties already provided for a number of significant related internal and external powers which touch FDI. There was no distinct chapter on investment in the Treaty establishing the European Community, but nonetheless two main field of the EU law have been relevant to investment activities within the EU: movement of capital and establishment.[15] Additionally, the CCP was the major source of the EU competence on FDI, reflecting the intimate link between trade and investment.[16] Those chapters does not expressly provide for the possibility to conclude international agreements on investment. However, to the extent that international agreements on investment affect the scope of the common rules set by the Treaty's Chapter on capitals and payments, the exclusive Union's

[13] See: German Federal Constitutional Court, Judgment of 30 June 2009, BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. (1 - 421), para para 377. Internet: http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html

[14] *Ibidem.* Political ideologies that treated FDI may simply be differentiated in: 1) The Radical view, with Marxist roots: FDI are an instrument of imperialist domination; 2) Free market, with classical economic roots (Smith): FDI are the instrument for allocating production to most efficient locations; 3) Pragmatic nationalism views FDI as having both benefits and costs.

[15] Ex articles 56-59 of the TEC (now 63-66 of the TFEU).

[16] Common Commercial Policy, ex articles 131-134 of the TEC (now 206-207 of the TFEU).

competence to conclude agreements in this area would be implied.[17] Internal competence can itself be a source of external competence if necessary to attain its objective. It could even potentially be deemed exclusive if this is necessary to "preserve the effectiveness of Community law", and more likely if internal powers have been exercised. The EU also has the competence to conclude international agreements covering the entire scope of its internal policies.[18] Arguably, before the ToL, the widest possible interpretation could grant the EU full competence over FDI, while the narrowest could grant it none.[19] This was confirmed by the European Court of Justice, which provides that, in principle, all restrictions on payments and capital movements, including those involving direct investments are prohibited. It is important to note that, although as a general trend the ECJ favored the integration process and implicitly Commission's position, on some occasions it was more reserved, siding with the preservation of member states' prerogatives.[20]

The ToL will remove mixed competence for almost all trade agreements, and the only remaining areas of mixed competence will be those relating to non-trade-related intellectual property rights (and some issues linked to transport policy). Essentially for political reasons the ToL provides for the use of unanimity in decision-making when it comes to the so-called sensitive sectors of audio-visual, health, education and social services.[21] The wording suggests that this does not mean an automatic veto right for member states, but an opportunity to use unanimity where trade agreements "risk prejudicing the Union's linguistic and cultural diversity" or "seriously disturbing the national organization of [health, education and social] services and prejudicing the responsibility of member states to deliver them".[22]

The ToL states generally that the Council shall vote by qualified majority in the negotiation and conclusion of CCP agreements with third countries, but

[17] European Court of Justice, *Opinion 1/03* (*Lugano Convention*) [2006] ECR I-1145, para 114-117.

[18] Ex article 310 ECT; European Court of Justice, Case 12/86, *Meryem Demiret v. Stadt Schwabisch Gmund,* [1987] ECR 3719 at para. 9; this has been used to conclude many Association Agreements.

[19] On principle of implied external powers, see: Lorenza Mola, *Which role for the EU in the development of international investment law?*, Society of International Economic Law, Working Paper No. 26/08, July 2, 2008, http://www.ssrn.com/link/SIEL-Inaugural-Conference.html.

[20] Relevant ECJ cases and opinions for the CCP, such as Case 22/70 Commission v. Council (ERTA, the doctrine of implied powers), Opinion 1/75 (OECD Local Cost Standard), Joined cases 3-4 and 6/76 Kramer and others (Fisheries), Opinion 1/76 (Rhine Navigation), Opinion 1/78 (International Rubber Agreement), Opinion 2/91 (ILO), Opinion 2/92 (OECD National Treatment Instrument) and Opinion 1/94 (WTO).

[21] Art 207(4) of the TFEU.

[22] Stephen Woolcock, "EU Trade and Investment Policymaking After the Lisbon Treaty", op. cit., pp. 22-25.

specifies that for FDI (among others), "the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules."[23] However, the freedom of establishment and movement of capital and payments, the two most important internal policies relevant to investment in pre-Lisbon treaty arrangement, do not require unanimity aside from those exceptional measures which constitute a step backwards in Union law as regards the liberalization of the movement of capital to or from third countries to the extent that these are "internal" measures at all.[24]

The exclusive competence meant that all international treaties, for example in the framework of the World Trade Organization (WTO), fall under the exclusive competence of the Union. This abolishes the basis of the current case-law of the Court of Justice of the European Communities, according to which, due to the mixed competence in this area, WTO Agreement (1994) as a so-called mixed agreement, had to be concluded and ratified by the European Community and by the member states.[25] Accordingly, the Union shall have exclusive competence for the conclusion and the ratification of international agreements in the context of the common commercial policy, including those newly incorporated into the ToL; the necessity and the possibility an agreement being concluded by the member states and the participation of the national parliaments in accordance with their respective constitutional requirements cease to exist. In contrast, the role of the European Parliament, which, according to the pre-Lisbon provisions, not even has to be heard on the conclusion of agreements in the context of the common commercial policy, is strengthened. This may mean that with this exclusive competence presented, the Union attains the sole power of disposition of international trade agreements which may result in essential reorganizations of the internal order of the member states.[26] The shift of competences by the ToL, concerns the member states beyond the loss of their competence for concluding international trade agreements - and the elimination of the legislative participation of national parliaments – to the extent that it might reduce the status of the member states' membership in the World Trade Organization to a merely formal one.[27] The right to vote in the bodies of the World Trade Organization could solely be exercised by the European Union. Furthermore, the member states would lose their formal entitlement to be a party in the dispute settlement procedures of the World

[23] Article 207(4) of the TFEU.

[24] See Art. 64(3) of the TFEU.

[25] The Agreement Establishing the World Trade Organization (WTO Agreement) of 15 April 1994 (OJ 1994 no. L 336/3).

[26] This was one of the complainant's claims in the last year proceeding at the German Federal Constitutional Court regarding constitutionality of the ToL.

[27] See: BVerfG, 2 BvE 2/08, para 372-373.

Trade Organization. Additionally, the member states would be excluded from the global negotiations on new or amended agreements in the context of the extended common commercial policy, the so-called rounds of world trade talks. The presented shifts in competences lead to questions about the end of parallel membership of the EU member states in WTO.[28]

It must be noted that, formally, there are limits to an exclusive EU competence – in the treaty principle of parallelism, which reiterates *inter alia* the provisions according to which the exercise of the competences conferred by this treaty provisions in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the member states, and shall not lead to harmonization of legislative or regulatory provisions of the member states insofar as the Treaties exclude such harmonization.[29] This provision plays an "anti-circumvention" role, making sure that one cannot harmonize internally by means of an external policy. But how effective would it be this principle in practice to except from the exclusive Union competence the areas not subject to harmonization?[30]

In a public reaction to the ToL (in the Irish Referendum campaign especially) have been expressed a wide spectrum of viewpoints regarding the prospective effects of the ToL and its new provisions on FDI. Some stated that a member state for the first time gives up the right to legislate on inflows of foreign direct investment from outside the EU, while another insists that all EU member states remain free to determine their own policies regarding foreign direct investment. Still another finds that the new reference to FDI simply gives formal recognition to the current status quo. It might be said that in practice the changes will not be dramatic. The Commission has negotiated for the EU on all services and TRIPs since the 1980s and consensus has been the practice for decisions on major trade agreements for many years regardless of what is required on paper. Speaking of ratification, member state parliaments will only be asked to ratify small sections of agreements, with the bulk being ratified by the EP, but member state ratification has been largely a rubberstamping exercise for years.[31]

---

[28] See: Christian Tietje, „Das Ende der parallelen Mitgliedschaft von EU und Mitgliedstaaten in der WTO?", in: Herrmann/Krenzler/Streinz, Die Außenwirtschaftspolitik der Europäischen Union nach dem Verfassungsvertrag, 2006, pp. 161-171.

[29] Last paragraph of Article 207 TFEU. For a principle of parallelism see: George-Dian Balan, "The Common Commercial Policy under the Lisbon Treaty", Advanced Issues of European Law, Jean Monnet seminar, 6th session April 20-27, 2008, Dubrovnik, Re-thinking the European Constitution in an Enlarged European Union, pp. XX–ZZ, Internet, 8/8/2010, http://www.pravo.hr/_download/repository/GDB_JM_CCP.pdf

[30] The Lisbon Treaty excludes harmonization, for instance, in fields such as occupation, social policy, health, industry or culture.

[31] Stephen Woolcock, "EU Trade and Investment Policymaking After the Lisbon Treaty", p. 22.

In general, the EU's exclusive competence to conclude international agreements appears to extend to capital movements and trade related aspects of investment measures, but therefore not to un-truncated investment agreements. Meanwhile, member states can probably still conclude international agreements on the protection of FDI on their own, but no longer have the competence to do so for its establishment. But, it must be kept in mind that even when agreements fall largely outside exclusive EU competence, member states' treaty-making power is constrained due to their duty of loyalty and sincere cooperation with the EU, and their duty to support the Union's external policy "actively and unreservedly in a spirit of loyalty and mutual solidarity".[32]

INCREASED ROLE FOR THE EUROPEAN PARLIAMENT

The ToL enhances the formal position of the EP in EU external trade and investment policy in three main ways.[33] First, it grants the EP joint powers with the Council to adopt trade legislation. Before the ToL the Council had wide powers to adopt regulations governing trade with the EP included only through the non-binding consultation procedure, now ordinary legislative procedure.[34] The EP in general and the International Trade Committee (INTA) in particular will now share powers with the Council to adopt EU legislation on trade instruments as well as autonomous trade measures.[35] These new powers cover what might be termed the overall legislative framework, not detailed modifications. Second, the role of the INTA in the process of negotiation is enhanced. The ToL requires the Commission to report regularly to the special committee of the European Parliament (INTA) on the progress of negotiations as it does to the Trade Policy Committee.[36]

---

[32] See: Article 24 of the TEU (ex Article 11).

[33] Stephen Woolcock, "EU Trade and Investment Policymaking after the Lisbon Treaty", op. cit., p. 23.

[34] Art 207(2) states that the "EP and Council acting by means of regulations in accordance with the ordinary legislative procedure shall adopt the measures defining the framework for implementing the common commercial policy" (i.e. external trade). The ordinary legislative procedure is the new term for co-decision making.

[35] Trade instruments such as anti-dumping, safeguards and the Trade Barriers Regulation as well as autonomous trade measures such as the EU's Generalized System of Preferences scheme.

[36] Article 207(3) of the TFEU (ex Article 133 TEC) provided for Committee consisting of senior member state trade officials. The treaty does not give INTA the same status as the Trade Policy Committee, which will *assist* the Commission in negotiations. These provisions largely codify existing practice in the sense that the Commission has already been providing the INTA with written briefs on negotiations on a par with those provided to the Article 133 Committee. It remains to be seen, however, how the role of the EP and INTA will grow. Having the same information does not mean that the INTA will be able to engage in negotiations in the same detail as the Trade Policy Committee, which has more expertise, institutional memory and

A key issue determining the future influence of the EP is whether it will have any say in EU negotiating objectives. Prior to the ToL these were determined exclusively by the Council with the EP only able to pass resolutions that were not binding on the Council or the Commission. This severely limited the credibility of EP control over trade policy. The EP had power to grant its assent to most trade – and all association – agreements but only after all the member states in the Council and all the EU's negotiating partners had agreed to the deal. In these circumstances a negative vote by the EP was simply not a credible option. The ToL does not grant the EP powers to authorize the Commission to engage in trade negotiations; these are retained by the Council.[37]

The third change with the ToL is the enhanced role of the EP in ratifying trade agreements. Conditions that have to be met require the consent of the EP, by a simple majority, before the Council can adopt a decision, by qualified majority voting, concluding a trade agreement.[38] The ToL adds the further condition for consent when the ordinary legal procedure applies to the policy area concerned, which is the case for external trade and investment. Again the ToL is to some degree codifying existing practice here in that the EP has been asked to grant its assent to major trade agreements, but the ToL makes clear that the consent of the EP will now be required for all trade agreements.

In respect of the trade as part of the EU's external action, in terms of treaty provisions, which provides the procedure to be followed for negotiating all international agreements, states that the Council will nominate either the Commission or the High Representative for Foreign and Security Policy (HRFSP) as negotiators.[39] Where the agreement relates exclusively or principally to common foreign and security policy this would clearly be the HRFSP, but what about trade? According the ToL, the Commission will negotiate.[40] Consequently, one must expect that the Commission will continue to be the EU's negotiator on the substance of trade. Just what role the HRFSP will play in shaping the balance between trade and other objectives, will depend on how the relationship develops between the HRFSP (and the new European External

meets every week rather than once a month as in the case of the INTA, but there is the potential for INTA to play a much more important role than it has in the past. See: Stephen Woolcock, "EU Trade and Investment Policymaking after the Lisbon Treaty", op. cit., p. 23.

[37] *Ibidem*. See: Arts. 207(3) and 218(2) of the ToL (ex Article 300 TEC). So there is no US Congress-like power for the EP to authorize and thus set the objectives of trade negotiations. But the EP is seeking to get some say in setting the EU's objectives as part of the negotiations on a new framework agreement between the EP and the Commission.

[38] Article 218 (6) (a) (i) to (v) of the TFEU. These are similar to the conditions requiring EP assent before the ToL and include association agreements, agreements establishing a specific institutional framework, and agreements with budgetary implications.

[39] Article 218 of the ToL.

[40] Article 218(1) of the ToL.

Action Service, EEAS), the Commission and the Council. One indicator of how things might develop is where the Commission staff working on trade will sit.[41]

DEFINITION OF FDI AND STANDARDS OF THE BITS

Definition of the FDI

The extension of the common commercial policy to FDI confers the European Union exclusive competence. Much, however, argues in favor of assuming that the term "foreign direct investment" only encompasses investment which serves to obtain a controlling interest in an enterprise.[42] The consequence of this would be that exclusive competence only exists for investment of this type, whereas investment protection agreements that go beyond this would have to be concluded as mixed agreements.

FDI is generally considered to include any foreign investment which serves to establish lasting and direct links with the undertaking to which capital is made available in order to carry out an economic activity. The terms "direct investment" appeared in the Treaty chapter on capital movements and payments, and in that context, they have been interpreted by the Court of Justice. When investments take the form of a shareholding this objective presupposes that the shares enable the shareholder to participate effectively in the management of that company or in its control. This contrasts with foreign investments where there is no intention to influence the management and control of an undertaking. Such investments, which are often of a more short-term and sometimes speculative nature, are commonly referred to as "portfolio investments". The Court of Justice has described the notion of "portfolio investment" as "the acquisition of shares on the capital market solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking".[43] This is in turn largely based on widely accepted definitions of the IMF and the OECD.

---

[41] A decision appears to have been taken that they will stay in DG Trade and not move to the EEAS. The institutional memory and technical expertise that is central to trade policy will therefore reside in DG Trade.

[42] See, for example: "Christian Tietje, "Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon", *Beiträge zum Transnacionalen Wirtschaftsrecht*, Christian Tietje/Gerhard Kraft (Hrsg.), Heft 83, Institut für Wirtschaftsrecht, 2009, pp. 15-16. Internet:http://www.wirtschaftsrecht.uni-halle.de/Heft83.pdf

[43] These Treaty provisions have been interpreted by the Court of Justice in light of the Nomenclature annexed to Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ L 178, 8.7.1988, pp. 5-18). See also e.g.: Judgment of 12 December 2006, *Test Claimants in the FII Group Litigation*, Case C-446/04, ECR p. I-11753, para 181; Judgments of 24 May 2007, *Holböck*, C-157/05, ECR. p. I-4051, para 34; 23 October 2007, *Commission/Germany*, C-112/05, ECR p. I-8995, para 18.

Standards and the further validity of BITs

The most visible manifestation of member states' policies on investment over the last 50 years is the number of so-called Bilateral Investment Treaties (BITs) that they have concluded with third countries. Germany was the first nation in the world to conclude a BIT (1959) and many countries around the world have followed suit.[44] With a total of almost 1200 agreements that cover all forms of investment, EU member states together account today for almost half of the investment agreements currently in force around the world.[45] At the end of 2007, a total of 2,608 bilateral investment protection agreements existed worldwide.[46] However, not all member states have concluded such agreements, and not all agreements provide for the same high standards.[47] This leads to an uneven playing field for EU companies investing abroad, depending on whether they are covered as a "national" under a certain member state BIT or not.

Many states have concluded BITs whose subject-matter is the protection of property as regards foreign assets. Through BITs, member states have sought, and obtained, from third countries specific guarantees on the treatment of their investors and investments by those third countries, for example commitments against unfair or discriminatory treatment or a guarantee of prompt, adequate and effective compensation in case of expropriation. These investment protection guarantees constitute one important element of building confidence in the legal security required for taking sound investment decisions. Another feature of the agreements of member states is that they relate to the treatment of investors "post-entry" or "post-admission" only. This implies that member states' BITs provide no specific binding commitments regarding the conditions of entry, neither from third countries regarding outward investment by companies of our member states, nor *vice versa*. Gradually, the European Union has started filling the gap of "entry" or "admission" through both multilateral and bilateral agreements at EU level covering investment market access and investment liberalization. These have improved the conditions of market access for all EU investors, notably by ensuring the non-discriminatory treatment of investors upon entry to a third country market.[48] Currently in investment negotiations, the Union relies mostly on the

[44] Bilateral Investment Treaty between Germany and the Islamic Republic of Pakistan, 1959. The vast majority of foreign assets, which for the Federal Republic of Germany amounted to 5,004 billion euros in 2007 falls under the scope of application of 126 investment protection agreements currently in force.

[45] *World Investment Prospects Survey 2009-2011*, UNCTAD 2009, op. cit, p. 32.

[46] The UNCTAD reports a total of 2676 BITs, but this figure includes intra-EU BITs, which are BITs among EU member states.

[47] Ireland is the only EU member state that does not maintain any Bilateral Investment Treaty with a third country.

[48] At the multilateral level, the General Agreement on Trade in Services (GATS) provides for a framework for undertaking commitments on the supply of services through a commercial

principle of non-discrimination, which is the cornerstone of the global trading system. Non-discrimination is usually implemented through two basic standards, "most-favoured-nation treatment" and "national treatment", which are both relative standards, because they involve making a comparison between the treatment provided based on origin, rather than defining an absolute standard of treatment. Consequently, their content is determined on the basis of the treatment that a country grants to its foreign investors and investments and to its own investors and investments.

The continued legal existence of the BITs agreements already concluded is not endangered. International agreements of the member states that were concluded before ToL shall in principle not are affected by the ToL. That is an expression of the legal concept that a situation in the member states which qualifies as a legal fact will in principle not be impaired by a later step of integration. Furthermore, this corresponds to the current practice, expressly declared or tacitly practiced, concerning the continued validity of international agreements concluded by the member states. This was confirmed by the Commission in the most recent proposal for development of the common investment policy of the EU.[49]

Expropriation and compensation in BITs

While non-discrimination continues to be a key ingredient of the EU investment negotiations, BITs employ other standards as well, such as "fair and equitable treatment" after admission and "full security and protection" treatment. These standards do not imply a comparison to the manner in which comparable investments are treated. Moreover, a number of member state BITs provide for the protection of contractual rights granted by a host government to an investor ("umbrella clause"). They have been traditionally used in member states BITs and are an important element among others that should inspire the negotiation of investment agreements at the EU level.[50]

An important cornerstone of member state 'best practices' are clauses which place certain conditions upon the exercise of the host country's right to expropriate. While it follows from the Treaty,[51] it does not affect a member state's right to decide whether a given asset should be in public or private ownership, the Court's case law shows that this does not have the effect of

presence (defined as "mode 3" by GATS Article I). At the bilateral level, the Union has concluded negotiations with Korea on a Free Trade Agreement, which includes provisions on market access for investors and establishments.

[49] COM(2010)343 final, op. cit. See also: Article 351.1 of the TFEU (ex Article 307.1 of the ECT)

[50] *Ibidem*, pp. 8-9.

[51] Article 345 of the TFEU.

exempting expropriation measures from the fundamental rules of the Treaty, including those on freedom of establishment and free movement of capital.[52] According to the Commission, expropriation measures in the EU should be non discriminatory and proportionate to attain their legitimate objective (e.g. by providing for adequate compensation), hence the Union should include precise clauses covering this issue into its own future investment or trade agreements. A clear formulation of the balance between the different interests at stake, such as the protection of investors against unlawful expropriation or the right of each Party to regulate in the public interest, needs to be ensured.[53]

Enforcing investment commitments – binding dispute settlement

Ensuring the effective enforceability of investment provisions is a key objective of the Union, which has increased its focus in recent years on ensuring that agreements negotiated in the field of the common commercial policy can be effectively enforced, if necessary through binding dispute settlement. The Union has included in all of its recent free trade agreements (FTAs), an effective and expedient state-to-state dispute settlement system. This dispute settlement system will, in the future, cover the investment provisions of EU trade and investment agreement. In order to ensure effective enforcement, investment agreements also feature investor-to-state dispute settlement, which permits an investor to take a claim against a government directly to binding international arbitration. Investor-state dispute settlement, which forms a key part of the inheritance that the Union receives, from member state BITs, is important as an investment involves the establishment of a long-term relationship with the host state which cannot be easily diverted to another market in the event of a problem with the investment. Investor-state is such an established feature of investment agreements that its absence would in fact discourage investors and make a host economy less attractive than others.[54]

For these reasons, future EU agreements including investment protection should include investor-state dispute settlement, in the view of the Commission. This raises challenges relating, in part, to the uniqueness of investor-state dispute settlement in international economic law and in part to the fact that the Union has not historically been a significant actor in this field. Current structures are to some extent ill-adapted to the advent of the Union. To take one example, the Convention on the Settlement of Investment Disputes between States and

[52] See e.g. Court of Justice of the EU, Judgments of 23 February 2003, C-452/01, *Ospelt* [2003] ECR I-9743, para 24; 1 June 1999, C-302/97, *Konle* [1999] ECR I-3099, para 38; and of 6 November 1984, *Fearon*, C-182/83, ECR [1984] p. 3677, para 7.

[53] Likewise, EU clauses ensuring the free transfer of funds of capital and payments by investors should be included. COM(2010)343 final, pp. 8-9.

[54] *Ibidem*, p. 10

Nationals of Other States (the ICSID Convention), is open to signature and ratification by states members of the World Bank or party to the Statute of the International Court of Justice. The European Union qualifies under neither. The Commission will explore with interested parties the possibility that the European Union seek to accede to the ICSID Convention (noting that this would require amendment of the ICSID Convention).[55]

Conclusion of uniform EU BIT?

The Lisbon Treaty's attribution of EU exclusive competence on FDI integrates FDI into the common commercial policy. It also allows the EU to affirm its own commitment to the "open investment environment" as a tool of economic development. Until now, the Union and the member states have separately built around the common objective of providing investors with legal certainty and a stable, predictable, fair and properly regulated environment in which to conduct their business. While member states have focused on the promotion and protection of all forms of investment, the Commission elaborated a liberalization agenda focused on market access for direct investment. In this respect, a clear and complementary division of labour in the field of investment has resulted in a rather large and atomized universe of investment agreements. With a view to ensuring external competitiveness, uniform treatment for all EU investors and maximum leverage in negotiations, a common international investment policy should address all investment types and notably assimilate the area of investment protection, according to the Commission. "The Union should follow the available best practices to ensure that no EU investor would be worse off than they would be under member states' BITs. … While investment protection and liberalization become key instruments of a common international investment policy, there will remain significant scope for member states to pursue and implement investment promotion policies that complement and fit well alongside the common international investment policy. In general, a common policy will require more, rather than less, cooperation and coordination among the Union and the member states", concludes Commission. As in all areas of European policy-making, the thrust of the Union's action should be to deliver better results as a Union than the results that have been or could have been obtained by member states individually. While it is the Union's responsibility to promote the European model and the single market as a destination for foreign investors, it seems neither feasible nor

[55] The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) is available at: http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp. To date, over 140 states have ratified the Convention.

The European Communities successfully negotiated the amendment of, and subsequent accession to a number of international agreements/organizations. A recent example is the World Customs Organization.

necessarily to replace the investment promotion efforts of member states, as long as they fit with the common commercial policy and remain consistent with EU law, with a one-size-fits-all model for investment agreements with third countries. In accordance with that, as set out above, the proposed Regulation regarding transitional arrangements and continuing relevance of concluded BITs between the member states and third countries are first step in the development of a European international investment policy, which will be gradual and targeted and will also take into account relevant responses.[56]

ONGOING TRADE AND INVESTMENT NEGOTIATIONS OF THE EU WITH THIRD COUNTRIES

In the last Commission's proposals on current and future strategic partnership of EU, Commission aims to develop, at EU level, an international investment policy for better addressing investor needs and support the competitiveness of European enterprises. The Commission is aware that states and sub-national levels of government, i.e. various authorities are engaged competitively in promoting both inward and outward investment. Further, Commission proposes that each specific negotiating context need to be taken into account. The interests of stakeholders as well as the level of development of partners should guide the standards the Union sets in a specific investment negotiation. In the same way, the nature of the existing agreements of member states with any given third country need to be taken into account. BITs recently concluded by member states have largely a similar structure and content, but because there are some variations which might equally determine the objectives to be pursued in a specific negotiating context. For this reasons, the Commission submits mainly broad principles and parameters for future investment agreements. These are to be developed and fleshed out in country-specific negotiating recommendations which the Commission will submit subsequent.[57]

In considering criteria for the selection of partner countries, Commission notes that FDI is at present heavily concentrated among developed economies. "While this reflects these countries' economic importance in terms of GDP, it also underscores the generally favourable conditions for foreign investors prevailing in some of these markets. Actual trade and investment flows are in and of themselves important determinants for defining the priorities for EU investment negotiations. The Union should go where its investors would like to go, just like it should pave their way abroad, through the liberalization of investment flows. Markets with significant economic growth or growth

[56] I.e. COM(2010)343 final.

[57] COM(2010)343 final, op cit., pp. 4-6.

prospects present a particular opportunity in the current increasingly competitive environment. It is important that EU investors have access to these markets and that amid the changes that these economies might be undergoing, benefit from the availability of sufficient guarantees for fair and predictable treatment."[58] The Commission further remarks that the EU's interests in investment negotiations would also be determined "by the political, institutional and economic climate of our partner countries. The 'robustness' of investor protection through either host country or international arbitration would be important determinants in defining priority countries for EU investment negotiations. In particular, the capacity and the practice of our partners in upholding the rule of law, in a manner that provides a certain and sound environment to investors, are key determinants for assessing the value of investment protection negotiations."[59]

The Commission determines that, in the short term, the prospects for realizing the integration of investment into the common commercial policy arise in ongoing trade negotiations where the Union has so far only focused on market access for investors. "The latest generation of competitiveness-driven free trade agreements (FTAs) is precisely inspired by the objective of unleashing the economic potential of the world's important growth markets to EU trade and investment. The Union has an interest in broadening the scope of negotiations to the complete investment area. In some cases, we could also respond to a request from our negotiating partners themselves." In the EU-Canada negotiations towards a Comprehensive Economic and Trade Agreement, partners have expressed an interest in an agreement that would cover investment protection.[60] Other ongoing negotiations in which investment protection should be considered include the EU-Singapore negotiations towards a Free Trade Agreement, the EU-Mercosur trade negotiations, and the EU-India negotiations towards a Broad-based Trade and Investment Agreement.

The EU-Singapore negotiations towards a free trade agreement (FTA) are on track and that one is shaping up well to be concluded before the end of next year.[61] The EU and Mercosur are also in the process of negotiating the FTA; between the EU and the Mercosur negotiations for an inter-regional Association Agreement were launched in 1999 but were, however, suspended in October 2004. During 2009 and 2010, the EU and Mercosur conducted a process of

[58] *Ibidem,* p 6.

[59] *Ibidem,* p. 6-7.

[60] See: Canada-European Union: Comprehensive Economic and Trade Agreement (CETA) Negotiations; Internet, 30.8.2010: http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/can-eu-report-intro-can-ue-rapport-intro.aspx.

[61] "EU-Singapore FTA discussions on track", 1.9.2010, http://www.singaporesetup.com/eu-singapore-fta-discussions-on-track/

informal contacts to take stock of the situations and assess if the conditions for a successful re-launch of the negotiations were present.[62] EU and India have been negotiating a trade deal since 2007, and have agreed to eliminate tariffs on 90% of traded goods; two sides are hoping that political momentum required concluding a trade agreement will come in next months, but some other aspects of the deal remain controversial. Trade dominates EU-India talks; however, India is unhappy at the EU's insistence on including human rights and environmental standards in the agreement.[63]

In the short to medium term, the Commission says that Union should also consider under which circumstances it may be desirable to pursue stand-alone investment agreements. China is characterized by a high proportion of greenfield investments, including from the EU and "may be one candidate for a stand-alone investment agreement, in which the protection of all kinds of assets including intellectual property rights should be covered". The Commission will explore the desirability and feasibility of such an investment agreement with China (and will report to the Council and the European Parliament). Russia also presents particular opportunities and challenges to European investors. The negotiation with Russia of investment including investment protection should be further considered and discussed, for example in the context of a comprehensive agreement, such as the agreement that would replace the Partnership and Cooperation Agreement.[64] Trade relationship of the EU with China and Russia are very controversial and largely intertwined with pure political consideration. The EU has long wanted Russia to join the WTO as it believes this would improve bilateral business links. But accession will require further Russian concessions on agricultural trade, technical regulations, and investment rules in the automotive sector. Tariff agreement paves way for trade support but there are differences over foreign policy and lifting of visas. The EU has offered Russia co-operation on crisis management and broader

[62] See web site of the European Commission: http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/regions/mercosur/

[63] India also rejects the EU's push for strict rules on generic medicines, although the two sides said that there had been "very good progress" on the issue. The EU has a habit of seizing medicines that are protected by patent rules in the EU but no longer in India and elsewhere, and both India and Brazil have complained to the World Trade Organization (WTO) about the practice. Anand Sharma, India's minister for industry and trade, suggested in October 2010 that India was about to withdraw its WTO complaint, and a breakthrough appears to be within reach at the summit, according to diplomats. See: Toby Vogel, "Trade to dominate India talks", *European Voice*, 2.12.2010, http://www.europeanvoice.com/article/imported/trade-to-dominate-india-talks/69629.aspx.

[64] The Commission opens up an option (whose desirability, feasibility and possible impact would be further assessed) for sectoral agreements, should a comprehensive, across-the-board, investment agreement with a country, or a set of countries, prove impossible or inadvisable in the foreseeable future. COM(2010)343 final, op cit., p. 7.

foreign policy issues but wants to see progress on "frozen conflicts" in Russia's neighbourhood, above all in Transdniester, a Russia-backed breakaway region of Moldova. Russia wants a future partnership agreement with the EU to have a technocratic focus, while the EU wants a Russian commitment to reform governance and the judicial system.[65] The EU lop-sided trade relationship with a commercially successful and increasingly assertive China is, also, crossed with political controversies.[66]

In recent months, the EU held several summits to discuss the strategic partnerships (for example, with China, and South Africa, as well as a wider EU-Asia summit that included India and Japan). Some observers said that these summits offered little evidence that the EU is succeeding in giving more substance to its strategic partnerships, and that "the term 'strategic partner' has no specific substance, nor is there a definition, although a number of countries have received the accolade – Brazil, Canada, China, India, Japan, Mexico, Russia, South Africa, the United States and, occasionally, Turkey."[67] Ahead of the summit that he had called for 16 September, Herman Van Rompuy, the president of the European Council, said that the EU had strategic partners but that it now needed a strategy to deal with them.[68] That is a fair description of the current situation.

Generally speaking, the new EU's exclusive competence and a success of the ongoing trade negotiations (including investment) must be seen in a wider context of intertwined legal and politico-economic relations. The EU is competing with the other economic superpowers for the biggest influence in world economic affairs. Recent summits did provide insights into the challenges

[65] Toby Vogel, "Russia hopes EU talks will provide support for WTO bid", 02.12.2010, http://www.europeanvoice.com/article/imported/russia-hopes-eu-talks-will-provide-support-for-wto-bid/69590.aspx. See also: "A simpler era in EU-Russia relations?", European Voice, 02.12.2010/, http://www.europeanvoice.com/article/imported/a-simpler-era-in-eu-russia-relations-/69597.aspx

[66] China is the EU's largest trade partner after the US, with bilateral trade worth €82 billion a year. The EU, in the so-called E3+3 diplomatic group on Iran, is also seeking Chinese backing for potentially extending economic sanctions against Teheran if it does not back down on its alleged nuclear weapons programme. On the other side, China back in November sent letters to all the EU delegations in Oslo urging them to boycott the Nobel peace prize ceremony. High officials have in recent weeks also warned there would be "'consequences' for countries that refuse to toe the line and called the Nobel committee 'clowns'". EU foreign relations chief Catherine Ashton has brushed aside calls by a leading MEP for her to attend the ceremony in defiance of Chinese diplomacy. See: Vincent Metten, "Will Ashton attend Nobel ceremony?", *European Voice*, 2.12.2010, http://www.europeanvoice.com/article/imported/will-ashton-attend-nobel-ceremony-/69610.aspx; Andrew Rettman, "Ashton declines MEP's appeal on Nobel gala", *EUobserver*, 08.12.2010, http://euobserver.com/9/31461 http://euobserver.com/9/31461.

[67] Toby Vogel, "Partnerships with equal benefits?", *European Voice*, 14.10.2010, http://www.europeanvoice.com/article/imported/partnerships-with-equal-benefits-/69152.aspx

[68] *Ibidem.*

that the EU faces as it seeks to re-define its relations with the wider world now that the ToL is in force. With the ToL, the EU is seeking – once again – to become a major player in this arena. The BRIC countries (Brazil, Russia, India, and China) are challenging the existing economic order and add, with their own interests, a further complication of matters.[69]

LITERATURE

- Balan, George-Dian, "The Common Commercial Policy under the Lisbon Treaty", *Advanced Issues of European Law*, Jean Monnet seminar, 6th session April 20-27, 2008, Dubrovnik, Re-thinking the European Constitution in an Enlarged European Union, pp. XX–ZZ, Internet, http://www.pravo.hr/_download/repository/GDB_JM_CCP.pdf
- Guimón, José, "It's time for an EU Investment Promotion Agency", *Columbia FDI Perspective,* Vale Columbia Center on Sustainable International Investment, No. 20, March 4, 2010. Internet: http://www.vcc.columbia.edu/
- Kekic, Laza, "The global economic crisis and FDI flows to emerging markets", *Columbia FDI Perspective,* No. 15, October 8, 2009. Internet: http://www.vcc.columbia.edu/
- Mola, Lorenza, "Which role for the EU in the development of international investment law?", Society of International Economic Law, Working Paper No. 26/08, July 2, 2008, http://www.ssrn.com/link/SIEL-Inaugural-Conference.html
- Rettman, Andrew, "Ashton declines MEP's appeal on Nobel gala", *EUobserver*, 08.12.2010, Internet: http://euobserver.com/9/31461
- Tietje, Christian, "Das Ende der parallelen Mitgliedschaft von EU und Mitgliedstaaten in der WTO?", in: Herrmann/Krenzler/Streinz, *Die Außenwirtschaftspolitik der Europäischen Union nach dem Verfassungsvertrag*, Baden-Baden, 2006.
- Tietje, Christian, "Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon", *Beiträge zum Transnacionalen Wirtschaftsrecht*, Christian Tietje/Gerhard Kraft (Hrsg.), Heft 83, Institut für Wirtschaftsrecht, 2009; http://www.wirtschaftsrecht.uni-halle.de/Heft83.pdf

[69] Some observers doubt "a coalition between the USA and the EU to influence the world economic order in a democratic and western market economy driven way", even if this model is envisaged by political scientists and economists, as a "wishful thinking". Such an EU–USA economic cooperation is not mentioned in the 2006 Commission Communication on "Global Europe, Competing in the World". There are proposals that China and the USA should, as a new "G2", work together on and be responsible for the new world order, putting the EU – still an economic superpower but without a clear voice – aside. "Thus, in political reality the USA and the EU, even though economically highly interdependent, are both acting independently from each other." Marc Bungenberg, "Going Global? The EU Common Commercial Policy After Lisbon", *European Yearbook of International Economic Law,* 2010, Volume 1, Part 1, pp. 123-151.

- Vogel, Toby, "Partnerships with equal benefits?", *European Voice*, 14.10.2010, Internet: http://www.europeanvoice.com/article/imported/partnerships-with-equal-benefits-/69152.aspx
- Vogel, Toby, "Russia hopes EU talks will provide support for WTO bid", 02.12.2010, Internet: http://www.europeanvoice.com/article/imported/russia-hopes-eu-talks-will-provide-support-for-wto-bid/69590.aspx
- Vogel, Toby, "Trade to dominate India talks", *European Voice*, 2.12.2010, Internet: http://www.europeanvoice.com/article/imported/trade-to-dominate-india-talks/69629.aspx
- Woolcock, Stephen, "EU Trade and Investment Policymaking after the Lisbon Treaty", *Intereconomics: Review of European Economic Policy*, 2010, vol. 45, issue 1, page 22-25.

DOCUMENTS

- COM(2010) 2020, *Europe 2020: A strategy for smart, sustainable and inclusive growth*, European Commission, Communication from the Commission, Brussels, 3.3.2010. Internet: http://register.consilium.europa.eu/pdf/en/10/st07/st07110.en10.pdf
- COM(2010)343 final, *Towards a comprehensive European international investment policy,* Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, European Commission, Brussels, 7.7.2010.
- Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, *Official Journal* C 83, 30.3.2010.
- German Federal Constitutional Court**,** Judgment of 30 June 2009, BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. (1-421). Internet: http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html
- The Agreement Establishing the World Trade Organization of 15 April 1994, *Official Journal*, L 336/3, 1994.
- *World Investment Prospects Survey 2009-2011*, UNCTAD 2009, United Nation Conference on Trade and Development, New York and Geneva, Internet, http://www.unctad.org/en/docs/diaeia20098_en.pdf