The Division of Competences Between the EU and Its Member States in the Area of Investment Politics

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Even though the EC competences for investment treaty-making "before Lisbon" were limited, the Commission had nevertheless already been heading towards a broad and proactive approach on this issue.[1] The EU was making efforts in developing its own foreign investment promotion and protection policy by including rules on investment in Preferential Trade Agreements (PTAs) as well as by setting up its own "EU Minimum Platform on Investment" (MPoI).[2] With the entry into force of the Treaty of Lisbon on 1 December 2009, multiple questions resulting from a new division of competences between the EU and its Member States in the area of international investment policy have to be answered. This paper discusses the reason for the transfer of these specific competences (theses 1 and 2) and then addresses specific issues such as the scope of application of this Article 207 competence (thesis 3), the competences for the renegotiation of existing Member States' Bilateral Investment Treaties (BITs) and the conclusion of new EU international investment agreements (thesis 4) and for the regulation of market access of sovereign wealth funds (thesis 5). It is shown that the current division of competences is still insufficient for a coherent and efficient investment policy (thesis 6). Therefore, cooperation between the EU and its Member States is necessary. Ideas for new modes of investment protection are left for discussion

[1]See, in this volume, S. Hindelang and N. Maydell, The EU's Common Investment Policy – Connecting the Dots, p. 1 et seq. and C. Nowak, Legal Arrangements for the Promotion and Protection of Foreign Investments within the Framework of the EU Association Policy and European Neighbourhood Policy, in this volume, p. 105 et seq.

[2]Minimum Platform on for the EU FTAs, revised version of 6 March 2009; on this in general N. Maydell, The European Community's Minimum Platform on Investment or the Trojan Horse of Investment Competence, in: A. Reinisch/C. Knahr (eds.), *International Investment Law in Context*, 2008, pp. 73–92; M. Burgstaller, European Law and Investment Treaties, JIA 26 (2009), pp. 181 et seq. (204 et seq.); the MPoI serves as a standardized negotiation proposal for ongoing and future PTA negotiations with third states.

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by *Tillmann R. Braun*[3] and *Jörn Griebel*,[4] and the need for the inclusion of "non-investment issues" in investment politics is discussed by *Lars Markert*.[5]

First Thesis: The inclusion of the provisions on foreign direct investments into the chapter on the Common Commercial Policy reflects reciprocal synergistic effects between foreign investments and international trade

The increasing importance of investment policy in international economic negotiations is obvious.[6] Rules on investment promotion and protection can stimulate trade relations and have an influence on the quality and quantity of investments.[7] Rules on the freedom of capital movement were, for example, part of the Treaty Establishing the European Economic Community signed in Rome in 1957, even though trade in goods at that time was still the centre of attention. However, one element of "economic globalization" is the globalization of capital; capital is a production factor and its free transfer stimulates trade in goods – at least in the long run.[8] The synergic effect of the expansion of trade and investment is supposed to lead to further economic growth.[9] Limits on the ability of governments to interfere with the operation of foreign investors reduce the political risks associated with an investment, which should result in greater levels of investment in a given economy.[10]

The number of pure BITs continues to rise,[11] but because of their interrelation with trade rules chapters on investment more and more often form an integral part

[3]T.R. Braun, For a Complementary European Investment Protection, in this volume, at 95 et seq.

[4]J. Griebel, The Great New Challenge after the Entry Into Force of the Treaty of Lisbon: Bringing About a Multilateral EU-Investment Treaty, in this volume, p. 139 et seq.

[5]L. Markert, The Crucial Question of Future Investment Treaties: Balancing Investors' Rights and Regulatory Interests of Host States, in this volume, at 145 et seq.

[6]On this, see for example A. Newcombe and L. Paradell, Law and Practice of Investment Treaties, 2008, p. 41 et seq.

[7]M. Lesher/S. Miroudot, The Economic Impact of Investment Provisions in Regional Trade Agreements, OECD Trade Policy Working Paper No. 36/2006.

[8]On the relationship between trade and investment, see for example, the Report (1998) of the (WTO) Working Group on the Relationship between Trade and Investment to the General Council, WT/WGTI/2.

[9]P. Gugler/J. Chaisse, Foreign Investment Issues and WTO Law - Dealing with Fragmentation while waiting for a Multilateral Agreement, in: J. Chaisse/T. Balmelli (eds.), *Essays on the Future of the World Trade Organization*, Vol. I, 2008, pp. 135 et seq.

[10]S. McGuire/M. Smith, *The European Union and the United States – Competition and Convergence in the Global Arena,* 2008, p. 142.

[11]See UNCTAD, Recent developments in international investment agreements (2008 - June 2009), IIA Monitor (2009) 3, p. 2 figure 1; in 2008, 59 new BITs were concluded, the total number of BITs rose to 2,676 at the end of 2008.

of new "Free Trade Agreements" (FTAs) and Preferential Trade Agreements (PTAs). Thus, the inclusion of competences on foreign investments reflects today's reality regarding international economic agreements. FTAs very often are not "pure" any more, but broader "international economic agreements" or PTAs do contain rules on investment promotion and protection as well. Reflecting this trend, "investment" has been on the WTO agenda since the WTO Singapore Conference in 1996 and later was included in the Doha Ministerial Declaration of 2001:[12]

> Relationship between trade and investment
>
> 20. Recognizing the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment, that will contribute to the expansion of trade, and the need for enhanced technical assistance and capacity-building in this area as referred to in para. 21, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations.

Due to strong synergies of trade and investments, the "European Convention for a Treaty Establishing a Constitution for Europe", which completed its work on 10 July 2003, included in its proposal at a very late stage the competences for foreign direct investments within the chapter on the Common Commercial Policy. The comments of the Secretariat of the European Convention confirm this position, stating that the added reference to foreign direct investments was made *in recognition of the fact that financial flows supplement trade in goods and today represent a significant share of commercial exchanges.*[13] Furthermore the European Convention took into account the necessary competences for a future final agreement to the Doha Round.

Some delegates to the European Convention – the at that time French foreign minister *Dominique de Villepin* as well as the at that time German foreign minister *Joschka Fischer* and others – suggested deleting "foreign direct investments" from the chapter on the Common Commercial Policy, with no success.[14] It was left as it stood in the Constitutional Treaty even during the Lisbon Treaty negotiations. This was surprising, because (a) the consequences were already starting to be discussed[15] and (b) investment policy was no longer on the WTO Doha Agenda: in the aftermath of the WTO Ministerial Conference in Cancún (10–14 September 2003)[16] the trade ministers of the WTO Member States decided to exclude "trade

[12]WTO approach see WT/MIN(01)/DEC/1 of 20 November 2001, point 20.

[13]CONV 685/03, Document of 23 April 2003, comments on Article 23.

[14]See CONV 707/03, 13 May 2003; CONV 821/03, 27 June 2003.

[15]See as the first ones examining this new development J. Ceyssens, Towards a Common Foreign Investment Policy? – Foreign Investment in the European Constitution, Legal Issues of Economic Integration (2005), pp. 259 et seq. (278 et seq.); J. Karl, The Competence for Foreign Direct Investment, JWT&I 5 (2006), pp. 413 et seq.

[16]See for example, P. Sauvé, Multilateral Rules on Investment: Is forward Movement possible, J Int Economic Law 9 (2006) 2, pp. 325 et seq.; on the Cancun Ministerial Summit in general see,

and investments" from the Doha Agenda.[17] Therefore the inclusion of (only) "foreign direct investments" into the Common Commercial Policy even after the entry into force of the Lisbon Treaty is more than surprising regarding the far-reaching effects this transfer has, as will be shown in the following subsections of this paper.

Second Thesis: The transfer of investment policy competences to the EU is supposed to give the EU the necessary legal basis to conclude international investment agreements as well as broader PTAs in an international competition of systems

The protection of foreign investments via "special" international investment agreements is of growing importance, since the attempt to find a multilateral solution to the problem of the fragmentation of investment law[18] has failed on various occasions already, and general public international law does not give sufficient protection for investors, as is pointed out in recent books on investment law by, for example, *Dolzer* and *Schreuer*[19] and *Griebel*.[20] Thus, it is up to governments to individually preserve their undertakings and investors with the best legal setting of rules on investment promotion and protection possible.

Competition between the USA, China and the EU as well as other players for their positions in the new economic order of the twenty-first century in trade as well as foreign investments is a situation to which all actors in the global arena must adapt. In general, the globalization of markets leads to regulatory competition in the field of economic law. Investors seek locations for production, distribution, research and development on the basis of efficiency criteria only. The possibility of almost global market access for business affects governments. These have to present investors with legal systems offering stability, freedom and protection of inward and outward investments. Therefore, governments also have the role of system providers to attract investment.[21] Today's globalization of markets for

for example. J. Bhagwati, Don't Cry for Cancún, Foreign Affairs 83 (2004), pp. 52 et seq., R. Sally, The End of the Road for the WTO? World Economics 5 (2004), pp. 1 et seq.

[17]Decision Adopted by the General Council on 1 August 2004, Doc. WT/L/579; on the "July Package" see F. Ismail, A Development Perspective on the WTO July 2004 General Council Decision, JIEL 8 (2004), pp. 377 et seq.

[18]See on this A. van Aaken, Fragmentation of International Law: The Case of International Investment Protection, Finnish Yearbook of International Law (2008), pp. 93 et seq.

[19]R. Dolzer/C. Schreuer, *Principles of International Investment Law*, 2008, pp. 11 et seq.

[20]J. Griebel, *Internationales Investitionsrecht*, 2008, pp. 14 et seq.

[21]For an explanation of the regulatory factors liable to channel economic activities to certain locations, see C. Tiebout, A pure Theory of Local Expenditures, J. Pol. Econ. 64 (1956), pp. 416 et seq.; for an overview on the economic theory on interjurisdictional competition and legal federalism see S. Sinn, *Competition for Capital, On the Role of Governments in an Integrated World*

goods and capital imposes a merciless "competition of systems".[22] In the areas of trade and investment this leads to a "competitive liberalization" with a liberal trade and investment regime.[23]

The possible escape[24] from a competition of economic law systems by harmonizing certain areas of international investment law has failed,[25] as already mentioned and as pointed out in length in other publications. "Trade and investment" was finally removed from the Doha Agenda. Ever since, the main actors in the global arena have given priority to bilateral and regional trade negotiations to promote inward investments and to provide their economy with better business opportunities.[26] The offers that existing global players can make to the states of the emerging economies and developing countries individually will be a relevant factor for the future economic world order.[27] Thus, the struggle for agreements with emerging markets, especially on market access, (exploration of) resources and investments and their protection are of significant importance for the position of nation states and international organizations as economic actors in their global competition. The EU, China and the USA are building separate networks of free trade relations and PTAs as "superhubs".[28] This is not only true for trade relations but at the same time for the liberalization of foreign investments and their protection, all actors being aware of the importance of an internationalized legal investment setting.

The USA is using "pure" BITs parallel to including investment promotion and protection chapters in broader FTAs.[29] After 2003, the US government concluded

Economy, 1993; H. Siebert (ed.), *Locational Competition in the World Economy*, 1995; L. Gerken, *Der Wettbewerb der Staaten*, 1999; V. Vanberg/W. Kerber, *Institutional Competition Among Jurisdictions*, Constitutional Political Economy 10 (1994), pp. 219 et seq. Especially on the role of economic law in the competition of systems, see K.M. Meessen, Economic Law as an Economic Good, in: K.M. Meessen/M. Bungenberg/A. Puttler (eds.), *Economic Law as an Economic Good: The Rule and the Tool Function in the Competition of Systems*, 2009, p. 5.

[22]K.M. Meessen, *Economic Law in Globalizing Markets*, 2004, p. 9.

[23]F. Bergsten, *Competitive Liberalization and Global Free Trade: A Vision for the Early 21st Century*, Institute for International Economics Working Paper 96-15.

[24]W. Kerber, The Theory of Regulatory Competition and Competition Law, in: K. Meessen/M. Bungenberg/A. Puttler (eds.), *Economic Law as an Economic Good: The Rule and the Tool Function in the Competition of Systems*, 2009, p. 28.

[25]On the OECD approach see Chapter III Article 1 MAI Negotiating Text, http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf; see on this P. Muchlinski, The Rise and Fall of the MAI: Lessons for the Regulation of International Business. in: I. Fletcher/L. Mistelis/M. Cremona (eds.), *Foundations and Perspectives in International Trade Law*, 2001, pp. 114 et seq.

[26]On this, see also S. Woolcock, *European Union policy towards free Trade Agreements*, ECIPE Working Paper No. 03/2007.

[27]On this, see P. Khanna, *The Second World, Empires and Influence of the New Global Order*, 2008.

[28]On the USA and the EU as superhubs, see P.J. Lloyd/D. MacLaren, The EU's New Trade Strategy and Regionalisation in the World Economy, Aussenwirtschaft (2006), pp. 423 et seq.

[29]S. McGuire/M. Smith, *The European Union and the United States – Competition and Convergence in the Global Arena,* 2008, p. 142; See on this A. Capling/K.M. Nossal, Investor-State Dispute Mechanisms in International Trade Agreements, Governance 19 (2006) 2, p. 57.

PTAs containing investment chapters with Australia,[30] various Central American states and the Dominican Republic,[31] Morocco,[32] Oman[33] and Peru.[34] PTAs with Colombia,[35] Korea[36] and Panama[37] have been signed but as of this writing are still awaiting Congressional approval and implementing legislation. The US Trade Representative gave a clear example for this "competition of investment laws" as he stated on the "Korea-EU Free Trade Agreement": *There is no investment chapter or investor-state dispute settlement provisions in the Korea-EU FTA (competency for investment matters rests with the individual EU Member States), whereas KORUS features investor protections*.[38]

The EU Commission communication on "Global Europe" reflects this trend of a stronger competition of systems as well.[39] The EU Commission observed in 2006, *in comparison to NAFTA countries' agreements, EU agreements and achievements in the area of investment lag behind because of their narrow content. As a result, European Investors are discriminated vis-à-vis their foreign competitors and the EU is loosing market shares*.[40] Therefore, the EU Commission had been taking a new approach to the establishment of its own investment policy even before the entry into force of the Lisbon Treaty. This had already started with the EU–Chile Agreement,[41] and continued with EU ambitions to set up an EU investment platform ("EU Minimum Platform on Investment") and the inclusion of investment chapters in EU PTAs currently being negotiated. The Commission has stressed that *Future FTAs should also include new provisions for investment. … A new, ambitious model EU investment agreement should be developed in close coordination with Member States. It could be usefully complemented by a dialogue on investment promotion and facilitation*.[42]

The EU did not possess the necessary competences for an effective EU investment policy in terms of a competition of systems before the entry into force of the Lisbon Treaty nor does it possess such competences since the entry

[30]United States–Australia Free Trade Agreement (AFTA), 18 May 2004.

[31]United States–Dominican Republic–Central America Free Trade Agreement (CAFTA), 5 August 2004. In addition to the Dominican Republic and the U.S., the parties are Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua.

[32]United States–Morocco Free Trade Agreement (MFTA), 14 June 2004.

[33]United States–Oman Free Trade Agreement (OFTA), 19 January 2006.

[34]United States–Peru Trade Promotion Agreement (PTPA), 12 April 2006.

[35]United States–Colombia Trade Promotion Agreement (CTPA), 22 November 2006.

[36]United States–Republic of Korea (KORUS FTA), 30 June 2007.

[37]United States–Panama Trade Promotion Agreement, 11 July 2007.

[38]USTR-release Preliminary Analysis of KOREA-EU Free Trade Agreement, October 2010 (http://www.ustr.gov/about-us/press-office/press-releases/2009/october).

[39]EU Commission, Global Europe: Competing in the World, COM (2006) 567 final.

[40]Commission, Upgrading the EU Investment Policy, Note for the Attention of the 133 Committee, Brussels, 30 May 2006.

[41]OJ 2002 L-352, signed on 18 November 2002.

[42]European Commission, Staff Working Document SEC (2006) 1230, 18.

into force of the Lisbon Treaty, as will be demonstrated in the third thesis. The USA seems to be more flexible and regarding its external competences it is "better equipped" than the EU. The latter is facing the difficulty of being an economic superpower, without being capable of negotiating with a single voice, due to the distribution of competences between itself and the Member States. To conclude: From a competition of systems perspective, a coherent trade and investment policy is necessary and has to lead to a sufficient transfer of competences to the European level to allow the EU to act in its external economic relations as efficiently as its main competitors, the USA and China. This "sufficient transfer" has not taken place so far.

Third Thesis: The notion "Foreign Direct Investments" is not defined in the Treaty on the European Union nor in the Treaty on the Functioning of the European Union. An interpretation of Article 207 TFEU leads to the conclusion that the competence covers the regulation of market access, material standards of protection and dispute settlement

Since the entry into force of the Lisbon Treaty, the EU possesses the exclusive competence in the field of "foreign direct investment" (Article 207 TFEU). Nevertheless, the scope of application of the EU foreign investment policy is not yet clear. Most BITs in force use the much broader term "investment" or the narrower terms "establishment" and "enterprise".[43] Neither the IMF interpretation given to the term "foreign direct investment" (reflecting the objective of obtaining a lasting interest by a resident entity in one economy in an enterprise resident in another economy)[44] nor EU secondary law in the capital directive[45] provides clear guidance with respect to the kind of policy instruments the EU would have at its disposal,[46] except for a wide interpretation of the notion "direct investment". Irrespective of the fact that a final definition of "foreign direct investment" does not seem possible, it is common understanding that foreign direct investments need to serve "to establish or to

[43]J. Karl, The Competence for Foreign Direct Investment – New Powers for the European Union? JWT&I 5 (2006) 3, pp. 413 et seq. (420).

[44]IMF Balance of Payments Manual (1993).

[45]Council Directive 88/361/EEC, 1988 OJ L-187/5: "Direct investments: Investments of all kinds by natural persons or commercial, industrial or financial undertakings, and which serve to establish or to maintain lasting and direct links between the person providing the capital and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity. This concept must therefore be understood in its widest sense. . . ."

[46]J. Karl, The Competence for Foreign Direct Investment – New Powers for the European Union? JWT&I 5 (2006), pp. 413 et seq. (421).

maintain lasting and direct links"[47] between the investor and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity. This is underlined by a communication from the EC and its Member States to the WTO Working Group on Trade and Investments[48]:

> Foreign direct investment is the category of international investment that reflects the objective of a resident entity in one economy (direct investor) obtaining a lasting interest in an enterprise resident in another economy (direct investment enterprise). The two criteria incorporated in the notion of "lasting interest" are: the existence of a long-term relationship between the direct investor and the enterprise and, the significant degree of influence that gives the direct investor an effective vice in the management of the enterprise.

Furthermore, the distinction between portfolio investments and foreign direct investments is generally accepted[49] and a decision has to be made on a case-by-case basis.

The wording of Article 207 TFEU does not contain any explicit limitation regarding the extent of competences for "foreign direct investments". For reasons of efficiency and practicability (*effet utile*) the EU should possess the competence for all possible aspects of (foreign direct) investment promotion and protection.[50] The intention of this far-reaching transfer of competences in the field of foreign direct investment is to strengthen the EU as an actor in bilateral and multilateral negotiations on investment policy.[51] As noted, chapters on investment are increasingly often part of PTAs and the EU's bargaining power with third countries is stronger than that of individual Member States, in particular the smaller ones. Therefore there might be a better chance to obtain more favourable conditions for EU investors.[52]

Furthermore, Article 345 TFEU does not exclude the extension of the new competences to the protection from expropriation[53]; it does not preserve exclusive powers for Member States to determine expropriation and has been interpreted narrowly so far.[54] The scope of Article 345 TFEU concerns the right of Member States to nationalize private property or to privatize public property only.[55] This

[47]Council Directive 88/361/EEC, 1988 OJ L-187/5

[48]See Communication from the EC and its Member States to the WTO Working Group on Trade and Investments, WT/WGTI/W/115, point 8.

[49]See R. Dolzer/C. Schreuer, *Principles of International Investment Law*, 2008, p. 64.

[50]J. Karl, The Competence for Foreign Direct Investment – New Powers for the European Union?, JWT&I 5 (2006) 3, pp. 413 et seq. (422).

[51]European Commission, Draft Articles Concerning External Action, CONV 685/03, 23 April 2003.

[52]J. Karl, The Competence for Foreign Direct Investment – New Powers for the European Union? JWT&I 5 (2006) 3, pp. 413 et seq. (425).

[53]See also C. Herrmann, Die Zukunft der mitgliedstaatlichen Investitionspolitik nach dem Vertrag von Lissabon, EuZW (2010), pp. 207 et seq. (211).

[54]See on this I. Brinker, Artikel 295, in: J. Schwarze (ed.), *EU-Kommentar*, 2000, Rn. 6.

[55]ECJ, Case 182/83 – *Fearon*, (1984) ECR, p. 3677.

narrow scope of application has been recognized in the field of intellectual property rights and protection, where the European Court of Justice (ECJ) found that the regulation of intellectual property rights concerning not only their existence can be adopted at the EU level.[56] As pointed out, Article 345 TFEU does not deal with the determination of the conditions under which an expropriation might take place; in international investment law it is the condition under which expropriation might take place and that forms a material standard of almost all BITs. Thus, the determination of this condition does not fall within the scope of Article 345 TFEU,[57] but falls within the scope of possible regulation covered by Article 207 TFEU.[58] This extensive interpretation can also be based on the broad EU competences for the regulation of intellectual property rights that are strongly related to property protection themselves.[59]

This leads to the conclusion that the EU, at least in the area of market access and material standards of protection (market access, pre- and postestablishment standards of treatment, possible performance requirements and the question of protection in terms of the conditions under which expropriation takes place) for foreign direct investments, is capable of concluding agreements similar to the standards included in US FTAs and BITs.[60] On the other hand, the extension of the scope of application of the Common Commercial Policy to portfolio investments[61] and other forms of investment (for example intellectual property rights) will not be covered by the scope of application of the term "foreign direct investment". Furthermore, the competences of the ECJ have to be respected when international investment agreements containing rules and mechanisms for investor–state/EU dispute settlement are negotiated.[62]

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[56]ECJ, Case C-92/92 and C-326/92 – *Phil Collins*, (1993) ECR I, p. 5155, para. 22; Case C-30/90 – *Commission v. UK*, (1992) ECR I, p. 829, para. 18.

[57]A. Dimopoulus, The Common Commercial Policy after Lisbon: Establishing Parallelism between Internal and External Economic Relations?, Croatian Yearbook of European Law and Policy 4 (2008), pp. 101 et seq. (text at footnote 48).

[58]On this, see, for example, C. Herrmann, Die Zukunft der mitgliedstaatlichen Investitionspolitik nach dem Vertrag von Lissabon, EuZW (2010), pp. 207 et seq.

[59]A. Dimopoulus, The Common Commercial Policy after Lisbon: Establishing Parallelism between Internal and External Economic Relations?, Croatian Yearbook of European Law and Policy 4 (2008), pp. 101 et seq. (text at footnote 46); see also J. Karl, The Competence for Foreign Direct Investment – New Powers for the European Union?, JWT&I 5 (2006) 3, pp. 413 et seq. (421); J. Ceyssens, Towards a Common Foreign Investment Policy? – Foreign Investment in the European Constitution, Legal Issues of Economic Integration (2005), pp. 259 et seq. (278 et seq.).

[60]See, for example, J. Karl, The Competence for Foreign Direct Investment – New Powers for the European Union? JWT&I 5 (2006) 3, pp. 413 et seq. (422).

[61]See, for example, H.G. Krenzler/C. Pitschas, Die Gemeinsame Handelsolitik im Verfassungsvertrag, in: C. Herrmann/H.G. Krenzler/R. Streinz (eds.), *Die Außenwirtschaftspolitik der Europäischen Union nach dem Verfassungsvertrag*, 2006, pp. 11 et seq. (27).

[62]On the role of the ECJ in international dispute settlement, see ECJ, Case C-459/03, *Commission v. Ireland* (MOX Plant decision), [2006] ECR I, p. 4635.

Fourth Thesis: The EU Member States have lost their competence to negotiate or conclude international agreements on foreign direct investments. The EU Member States cannot renegotiate existing BITs with third countries (outside the EU) that were concluded before the entry into force of the Lisbon Treaty, except if permission to do so is given by the EU

A first and direct consequence of the transfer of exclusive competences to the EU level in this field is that EU Member States are not allowed to conclude new BITs any more – this has been the common understanding of what the transfer of competences would lead to.[63] Irrespective of the entry into force of the Lisbon Treaty on 1 December 2010, Austria and Germany keep on signing BITs: Germany signed a BIT with Pakistan on 1 December 2009, and Austria followed the German example by signing a new BIT with Kazakhstan in January 2010. Both countries pointed out that the EU Commission gave its "consent" to the signature of those agreements. Nevertheless, on different occasions the EU Commission has stressed that its "consent" covers only the signature of the agreements and not their entry into force. However, before the entry into force of these new German and Austrian BITs, explicit permission from the EU adopted in an ordinary legislative procedure needs to be given to Germany and Austria; in any other case an entry into force of the agreements would violate EU law.

In addition, there is no provision recognizing the right of Member States to keep in place their existing agreements. Nevertheless, Member States' BITs not violating specific rules of EU law need to remain in force until the EU has concluded new international investment agreements with the third countries involved. It is argued that for reasons of legal certainty a "transmission regulation" is needed, as Commissioner for External Trade *Karel de Gucht* pointed out during the parliamentary hearings before being appointed Commissioner[64]: *There are existing investment agreements, by which I mean agreements for protecting investments. There are about a thousand of them. . . . First of all we will preserve legal certainty, then we will look closely at what initiatives we should take, and towards which countries. Within our prerogatives with respect to investment, legal certainty for investments in third countries is a main topic that we should certainly address very soon because, for example, it has a lot to do also with energy security. . . .*

[63] See, for example, M. Bungenberg, Going Global? The EU Common Commercial Policy After Lisbon, in: C. Herrmann/J. Terhechte (eds.), *European Yearbook of International Economic Law 2010*, pp. 123 et seq. (147); J. Karl, The Competence for Foreign Direct Investment – New Powers for the European Union?, JWT&I 5 (2006) 3, pp. 413 et seq.; A. de Mestral, The Lisbon Treaty and the Expansion of EU Competence over Foreign Direct Investment, in. K. Sauvant (ed.), *Yearbook on International Investment Law and Policy 2009/2010*.

[64] http://www.europarl.europa.eu/hearings/static/commissioners/cre/de_gucht.pdf.

In its decisions of March 2009 the ECJ pointed out that BITs violating EU law have to be modified or terminated.[65] From a legal point of view, the Member States have lost their competence to renegotiate their BITs (for example, if material standards were to be modified; not though if single provisions in contradiction to EU law were simply to be terminated) – even if they violate EU law. Either the EU empowers the EU Member States to renegotiate and modify the BITs in question or these BITs have to be terminated by the Member States.

Fifth Thesis: EU Member States do not have the competence to control foreign direct investments of Sovereign Wealth Funds in the EU market

With the entry into force of the Lisbon Treaty the "control of market access" of non-EU/non-EFTA investments in the EU market is exclusively on the EU level. The regulation of investments made by sovereign wealth funds as well as of private enterprises from abroad is covered by the EU Common Commercial Policy if they are determined as "foreign direct investments" and thus fall within the exclusive sphere of the EU.[66]

For example the German control of market access mechanism contradicts the current distribution of competences. Germany has introduced into its Foreign Trade and Payments Act (Außenwirtschaftsgesetz, AWG) a control mechanism for non-EU/non-EFTA investments in German enterprises that lead to a 25% or greater equity ownership.[67] The amendment of the AWG establishes a review procedure, administered by the Federal Ministry of Economic Affairs and Technology, for investments that threaten public policy or public security. The Ministry may prohibit acquisitions or subject them to mitigation measures. The procedure complements an existing review procedure that addresses investments in certain military goods and cryptographic equipment; the new procedure is not limited to specific industries only any more.

Three solutions in conformity with EU law to the "control of market access problem" seem possible. The first option is that the Member States abolish all kinds of market access control mechanisms and totally liberalize capital transfer and thus foreign direct investments from abroad as well. The second option is the introduction of a market access control system on the EU level, comparable to the Merger Control Regulation in competition law. The third option is a redelegation of powers

[65]ECJ, Case C-249/06, *Commission v. Sweden*, (2009) ECR I, p. 1335; Case C-205/06, *Commission v. Austria*, (2009) ECR I, p. 1301.

[66]See also C. Herrmann, Die Zukunft der mitgliedstaatlichen Investitionspolitik nach dem Vertrag von Lissabon, EuZW (2010), pp. 207 et seq. (209).

[67]On this, see T. Müller-Ibold, Foreign Investment in Germany: Restrictions Based on Public Security Concerns and Their Compatibility with EU Law, in: C. Herrmann/J. Terhechte (eds.), *European Yearbook of International Economic Law 2010*, pp. 103 et seq.

for such a mechanism to the Member States. This option is already foreseen in Article 2 TFEU: according to the definition given to "exclusive competence" by Article 2 TFEU *only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts*. Such a "share of policy" in a field of European exclusivity has been practised in other fields of the Common Commercial Policy. At least until the WTO Opinion of 1994 the ECJ gave a broad interpretation to the matters covered by the (already then) exclusive EU competence for trade in goods in ex-Article 133 TCE.[68] Nevertheless the General Export Regulation[69] gives the possibility to take into consideration a national *ordre public* when granting an export license to the Member States. The same is foreseen in the Regulation on the Export of Cultural Goods[70] and the Dual-Use Regulation.[71] The ECJ has already agreed to such a possibility of a redelegation, which is now as mentioned above laid down in Article 2 TFEU,[72] whereas the literature stayed reserved towards such an approach.[73] Nevertheless, a "Member States market access control mechanism" for foreign direct investments requires empowerment of the Member States by the EU in an ordinary legislative procedure.

Sixth Thesis: EU investment agreements comparable with US investment agreements in their scope of application and quality can only be concluded as "mixed agreements". Thus, a further transfer of competences from the Member States to the EU seems necessary to allow the EU to have a coherent and efficient investment policy in its international economic relations

The intention of the Lisbon Treaty's far-reaching transfer of competences in aspects of foreign direct investment is to strengthen the EU as an actor in bilateral and multilateral negotiations on investment policy.[74] As noted, chapters on investment are

[68]See ECJ, Opinion 1/78, (1979) ECR, p. 2871, para. 44.

[69]Council Regulation (EC) 1061/2009 establishing common rules for exports, OJ 2009 L 291, pp. 1 et seq.

[70]Council Regulation (EC) 116/2009 on the export of cultural goods, OJ 2009 L 39, pp. 1 et seq.

[71]Council Regulation (EC) 428/2009 setting up a Community regime for the control of exports of dual-use items and technology, OJ 2009 L 134, pp. 1 et seq.

[72]ECJ, Case 41/76 - *Donckerwolcke*, (1976) ECR, p. 1921, paras. 31/37; Case 174/84 – *Bulk Oil*, (1986) ECR, p. 559; Case C-70/94 – *Werner*, (1995) ECR I, p. 3189; Case C-83/94 – *Leifer*, (1995) ECR I, p. 3231.

[73]See Schaefer, *Die nationale Kompetenz zur Ausfuhrkontrolle nach Art. 133 EG*, 2009, pp. 113 et seq.

[74]European Commission, Draft Articles Concerning External Action, CONV 685/03, 23 April 2003.

increasingly often part of PTAs[75] and the EU's bargaining power is stronger than that of individual Member States, in particular the smaller ones, which is why it is more likely that the EU will obtain more favourable conditions for EU investors than the smaller Member States could.[76] The question is therefore to what degree the EU will be able to negotiate new agreements and if it will be capable of narrowing down the existing differences between EU and NAFTA countries' BITs.

The US approach is more coherent than the EU one. Both BITs and investment chapters in PTAs follow the US Model BIT (2004).[77] The objective of this Model BIT is to provide a consistent approach between the investment chapters of the PTAs and future US BITs.[78] The US Model BIT, generally "concerning the encouragement and reciprocal protection of investment", uses a broad definition of investment that extends to all "investments". The treatment provisions of the US Model BIT apply to the pre-establishment phase as well – in its Articles 4 and 5, the 2004 US Model BIT[79] explicitly stipulates the national treatment and most favoured nation treatment also for "establishment, acquisition, and expansion" of investments.[80] Furthermore US BITs in general contain rules on investor–state dispute settlement.

Obviously, the EU possesses an explicit exclusive competence only in the area of foreign direct investments. Most of today's approximately 2,700 BITs not only cover foreign direct investments, but also portfolio investments and their protection. Therefore, it is almost unanimously argued that future EU agreements that cover all forms of investments and their protection would not in their entirety fall under exclusive EU competences.[81] In conclusion, future agreements on investments even after the entry into force of the Lisbon Treaty are troublesome to negotiate if the objective of those future EU BITs is investment protection in its entirety. Treaty-making powers as well as competences for an autonomous regulation of portfolio investments are not part of the exclusive Common Commercial

[75]See above thesis 1 and 2.

[76]J. Karl, The Competence for Foreign Direct Investment – New Powers for the European Union? JWT&I 5 (2006) 3, pp. 413 et seq. (425).

[77]19 U.S.C.S. § 3801.

[78]On this see M. Kantor, The New Draft Model U.S. BIT: Noteworthy Developments, Journal of International Arbitration 21 (2004), pp. 383 et seq.; critical on this approach see S.M. Schwebel, The US 2004 Model Bilateral Investment Treaty, in: Liber amicorum in honour of R. Briner, *Global Reflections on International Law*, 2005, pp. 815 et seq.

[79]http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf.

[80]P. Gugler/V. Tomsik, The North American and European Approaches in International Investment Agreements, NCCR Working Paper No. 2006/04, p. 5.

[81]See C. Tietje, Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon, Beiträge zum Transnationalen Wirtschaftsrecht (2009), Heft 83 p. 16, http://www.wirtschaftsrecht.uni-halle.de/Heft83.pdf; M. Burgstaller, The Future of Bilateral Investment Treaties of EU Member States, in this volume, at p. 66.

Policy competences. Implicit treaty-making powers for this area of investment law could probably be based – as *Hindelang* and *Maydell*[82] have pointed out – on the provisions of the free movement of capital. Irrespective the general implicit external competence for the regulation of portfolio investments, it is questionable if the inclusion of a mechanism for state/EU-investor dispute settlement for the protection of portfolio investments would be covered by such a competence; the ECJ will have to give an opinion on this issue. Thus, it is most probable that new agreements comparable to US agreements need to be negotiated by the EU together with its Member States and will have to be concluded as mixed agreements.

Conclusion

It is obvious that EU investment protection is still facing multiple problems. Before 1 December 2009 it was a difficult situation, but at least the EU Member States were quite successful in concluding BITs. However, neither the EU nor its Member States were able to negotiate international investment agreements comparable to those of other actors on their own for a matter of distribution of competences. This has not changed. With the Lisbon Treaty in force, the EU's task for the coming years is how to solve this unsatisfactory post-Lisbon situation. The Lisbon transfer of competences in the area of investments does not enable the EU to position itself as a global actor in today's global investment politics. Further "problems" of a future EU investment policy are the politicization of the entire Common Commercial Policy including investment politics[83] and the new "powers" of the European Parliament.[84]

To conclude, the new EU international investment policy has to be shaped and developed – by the EU and its Member States together for reasons of insufficient EU competences. A solution might be a PLURILATERAL INVESTMENT PROMOTION AND PROTECTION PLATFORM, an agreement signed by both the EU and its Member States which is open for signature to third countries, too.[85] Such an EU-based approach could then develop into a multilateral solution.

[82]S. Hindelang/N. Maydell, The EU's Common Investment Policy – Connecting the Dots, in this volume, at p. 1.

[83]On this, see L. Markert, The Crucial Question of Future Investment Treaties:Balancing Investors' Rights and Regulatory Interests of Host States , in this volume, at p. 145.

[84]On this, see M. Bungenberg, Going Global? The EU Common Commercial Policy After Lisbon, in: C. Herrmann/J. Terhechte (eds.), *European Yearbook of International Economic Law 2010*, pp. 123 et seq. (128); S. Woolcock, EU Trade and Investment Policymaking After the Lisbon Treaty, Intereconomics 2010, pp. 1 et seq. (p. 2).

[85]On this topic, see J. Griebel, Überlegungen zur Wahrnehmung der neuen EU-Kompetenz für ausländische Direktinvestitionen nach Inkrafttreten des Vertrags von Lissabon, RIW 55 (2009), pp. 473 et seq.