For a Complementary European Investment Protection

Tillmann Rudolf Braun*

The following seven theses are possible policy recommendations for the future formulation of European investment protection "after Lisbon."

First Thesis: It is worthwhile re-examining the actual purpose of the protection of international investment through treaties in international law and investor–state arbitral tribunals, as the protection given to property by bilateral investment treaties is not provided merely as an end in itself. It is also expressly provided to create an international "rule of law,"[1] which is one of the most important preconditions for the beneficial private direct investment which is essential for the economic development of many countries.[2]

Furthermore, the second generation of bilateral investment treaties since the 1980s/1990s has made an important contribution to the creation of a unique investor–state arbitration system.[3] The task of these international arbitral tribunals

[1]Generally, see Tamanaha, *On the Rule of Law–History, Politics, Theory*, 2004; Dyzenhaus, The Rule of (Administrative) Law in International Law, Law & Contemp. Prob. 68 (2005), p. 127; Raz, The Rule of Law and its Virtue, L. Quart. Rev. 93 (1977), p. 195; Fallon, "The Rule of Law" as a Concept in Constitutional Discourse, Columb. L. Rev. 97 (1997), p. 1.

[2]"The protection of foreign investments is not the sole aim of the Lisbon Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties' economic relations."; *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL (Dutch/Czech BIT), Partial Award, 17 March 2006, Para. 300, http://ita.law.uvic.ca/documents/Saluka-PartialawardFinal.pdf; Koroma, The Effects of Globalization on the Development of International Law, in: Hobe (ed.), *Globalisation–the State and International Law*, 2009, p. 27: "The objective of international investment law is, however, not investor protection for its own sake, but rather protection of the infrastructure of and thereby promotion of economic growth and development. Investment treaties are thus both a product and a motor of globalization."

[3]Regarding the development of international investment law, see Braun, Investitionsschutz durch internationale Schiedsgerichte, TranState Working Papers 89 (2009), Universität Bremen, Sonderforschungsbereich 597, Staatlichkeit im Wandel, passim, http://hdl.handle.net/10419/27911;

T.R. Braun Ass. iur., M.P.A. (Harvard)
*The author's view is exclusively his own and does not necessarily represent the position of his employer
Auswärtiges Amt, Werderscher Markt 1, 10117 Berlin, Germany
e-mail: tillmann.braun@diplo.de

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was, and still is, to decide between the interests of the investor in protecting his foreign investment from state intervention, on the one hand, and the interests of the host state in implementing its public aims on the other hand. This led to a dispute arbitration system which denationalizes and depoliticizes conflicts between investors and states. It appears that investors currently view international investor–state arbitral proceedings as *the* most suitable instrument of last resort for the law-based[4] resolution of such problems.[5] The investor can independently assert the standards guaranteed in bilateral investment treaties against the host state directly at the level of international law. The subsequent elevation and recognition of the investor as a partial subject of international law – resulting from globalization – has helped to give international investment law its vigour and current importance and is rightly seen as a paradigm shift[6] in international law.

Moreover, it is noteworthy that today almost a third of all bilateral investment treaties are concluded between developing and emerging nations and also include investor–state arbitration.[7] This reflects the fact that large developing and emerging

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Braun, Globalization: The Driving Force in International Investment Law, in: Waibel/Kaushal/Chung/Balchin (eds.), *The Backlash against Investment Arbitration*, 2009, Chap. 21.

[4]Regarding other forms and possibilities of dispute resolution, see Braun, Home-State Assisted Negotiations—an Alternative to Mediation?, in: Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2009*, 2010; Coe, Towards a Complementary Use of Conciliation in Investor-State Disputes–A Preliminary Sketch, in: (ed.), *Investor-State Arbitration: Perspectives on Legitimacy and Practice*, Suffolk University 2009, pp. 73–112; Salacuse, Is there a better way? Alternative Methods of Treaty-Based Investor-State Dispute Resolution, 31 Fordham Int'l L.J. 31 (2007–2008), pp. 138–185; Schwebel, Is Mediation of Foreign Investment Disputes Plausible? ICSID Journal Fall 2007, pp. 237–241.

[5]UNCTAD, Latest Developments in investor-State dispute settlement, IIA MONITOR (2009) 1, UNCTAD/WEB/DIAE/IIA/2009/6, p. 2: "a trend (. . .) indicating that international investment arbitration is no longer an exceptional phenomenon, but part of the "normal" investment landscape"; p. 8: "Developments in 2008 confirm the trend towards increased use of international arbitration to resolve investment disputes."

[6]*BG v Argentina*, Award: "The proliferation of bilateral investment treaties has effected a profound transformation of international investment law. Most significantly, under these instruments investors are entitled to seek enforcement of their treaty rights by directly bringing action against the State in whose territory they have invested. Investors may seek redress in arbitration without securing espousal of their claim or diplomatic protection. The Argentina-U.K. BIT is a paradigm of this evolution." Award, 24 December 2007, UNCITRAL, http://ita.law.uvic.ca/documents/BG-award_000.pdf, M.N. 145; Schreuer, Paradigmenwechsel im internationalen Investitionsrecht, in: Hummer (ed.), *Paradigmenwechsel im Völkerrecht zur Jahrtausendwende*, 2002, p. 237; Salacuse/Sullivan, Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain, Harv. Int'l L. J. 46 (2005), p. 67 (88: "revolutionary innovation [whose]. . .uniqueness and power should not be overlooked"); Wälde, Improving Mechanism for Treaty Negotiation and Investment Disputes, in: Sauvant (ed.), *Yearbook on International Investment Law & Policy 2008/2009*, 2009, p. 505 (509: "[. . .] it is difficult to deny that we are facing a spectacular success in terms of international institutional and legal reform").

[7]Sachs/Sauvant, BITs, DTTs and FDI flows: an overview, in: Sauvant/Sachs (eds.), *The Impact of Bilateral Investment Treaties and Double Taxation Treaties on Foreign Direct Investment Flows*, 2009, p. xxvii et seq.; UNCTAD, *World Investment Report 2007*, 2007, p. 17; UNCTAD, *South-South Cooperation in International Investment Agreements*, 2005, p. 42.

nations have themselves become capital-exporting nations and they now also find themselves in the situation of having to adapt their investment policy and guarantee the protection of their own foreign investments. China is the classic example, being the number two worldwide behind Germany in terms of the number of bilateral investment treaties concluded. China first included an investor–state arbitration clause in its investment treaties with a developing country in its bilateral investment treaty with Barbados in 1998.[8] Its first treaty of this kind with an industrial state was the bilateral investment treaty with Germany in 2003.[9] The developing nations with the highest number of bilateral investment treaties in place generally tend to be some of the largest investors in other developing nations and have, therefore, become both host countries and countries of origin of investments.[10]

This elevation of the investor and the possibility of an investor–state arbitral proceeding resulting from bilateral investment treaties can also have the interesting consequence that diplomatic protection can be increased *in advance* of potential (arbitral) proceedings: The possibility of an investor initiating independent legal action in a case of arbitration under international law strengthens his negotiating position in relation to the host state – even before potential arbitral proceedings – since in any arbitral proceedings he has rights equal to those of the state and, therefore, usually enjoys international attention in advance.

Furthermore, both states know that, should political efforts to settle the dispute be unsuccessful, the investor can instigate proceedings on the basis of the bilateral investment treaty. Therefore, the present dense network of modern investment treaties which fundamentally allows and enables investor–state arbitral proceedings also performs a *dispute-avoidance* function.[11] An important aim of investment

[8]Regarding Chinese investment protection policy, see Schill, Tearing Down the Great Wall—the New Generation Investment Treaties of the People's Republic of China, Cardozo J. Int'l & Comp. L. 15 (2007), pp. 73–118; Berger, China and the Global Governance of Foreign Direct Investment: The Emerging Liberal Bilateral Investment Treaty Approach, Discussion Paper, Deutsches Institut für Entwicklungspolitik, 2008; Congyan, Change of the Structure of International Investment and the Development of Developing Countries' BIT Practice, JWIT 8 (2007), p. 829 (844); Rooney, ICSID and BIT Arbitrations and China, Journal of International Arbitration 24 (2007), p. 689.

[9]Braun/Schonard, Der neue deutsch-chinesische Investitionsförderungs- und -schutzvertrag im Lichte der Entwicklung des völkerrechtlichen Investitionsschutzes, RIW (2007), pp. 561–569; Braun / Schonard, The new Germany-China Bilateral Investment Treaty – A Commentary and Evaluation in Light of the Development of Investment Protection under Public International Law, ICSID Review 22 (Fall 2007), pp. 258–279; Braun/Schonard, 德国与中国的新双边投资条约: 以国际公法中投资保护制度的发展为背景的述评, Chinese Journal of International Economic Law (2009).

[10]After China (approximately 120 concluded bilateral investment treaties): Egypt (approximately 100), Republic of Korea (approximately 80); UNCTAD, *World Investment Report 2008*, 2008, p. 15, fig. I.11; UNCTAD, South-South Investments Agreements Proliferating, IIA Monitor No. 3 (2007), pp. 1 et seq.

[11]Braun, Home-State Assisted Negotiations—an Alternative to Mediation?, in: Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: Fordham Papers 2009*, 2010; Wegen/Raible, Unterschätzt die deutsche Wirtschaft die Wirksamkeit des völkerrechtlichen Investitionsschutzes?, SchiedsVZ (2006), p. 225 (226); Schöbener, Der Rechtsrahmen des

protection treaties could, therefore, be understood – not only from the viewpoint of the companies – to be the creation of a stable legal framework which is familiar to all parties, upon which the protagonists can rely and whose enforcement mechanisms do not necessarily have to be put in motion.

The "internationalization of the rule of law" and the legally binding nature of economic actions resulting from bilateral investment treaties and investor–state arbitral proceedings do not solely serve the interests of investors. They also equally serve the interests of the states and the international community as a whole in providing a basis for legal settlements in investment disputes between the host state and the investor, as well as in the enforcement of international law.

Moreover, reaching beyond any specific case, international investment law fulfils an *ordering function* for international investment relations. The legal implementation of international investment law can itself be described as a *global public good*.[12] Bilateral investment treaties and investor–state arbitration as an institutionalized form of an "investment law culture" remain committed to the common aim of promoting international economic exchange and development through the rule of law. The treaty states such as Germany – as well as the arbitral tribunals themselves[13] – bear the responsibility for ensuring a sensible form and functionality of this system of international investment arbitration.

Second Thesis: It would appear that there is no final consensus agreed by all participants concerning the exact extent of the future investment competence of the European Union [according to Art. 207 of the Treaty on the Functioning of the European Union (TFEU)]. However, it is likely that future investment treaties or investment chapters of the European Union could, in general, be described as *mixed treaties*.[14]

Internationalen Investitionsrechts: Ein Überblick zu den bilateralen Investitionsschutzabkommen, WiVerw 2009, p. 3 (18).

[12]Classically, see Samuelson, The pure theory of public expenditure, Review of Economics and Statistics 36 (1954), p. 387; Kaul/Grunberg/Stern, *Global Public Goods. International Cooperation in the 21st Century*, 1999; referring to international economic law: Tietje, Begriff, Geschichte und Grundlagen des Internationalen Wirtschaftssystems und Wirtschaftsrechts, in: Tietje (ed.), *Internationales Wirtschaftsrecht*, 2009, p. 58; Meessen, Economic Law as an Economic Good, in: Meessen/Bungenberg/Puttler, *Economic Law as an Economic Good*, 2009, p. 3.

[13]*MCI Power Group and New Turbine v Republic of Ecuador*, Decision on Annulment, 19 October 2009, http://ita.law.uvic.ca/documents/MCI-Annulment.pdf, Para. 24: "(. . .) The responsibility for ensuring consistency in the jurisprudence and for building a coherent body of law rests primarily with the investment tribunals."; and Para. 25: "(. . .) Although there is no hierarchy of international tribunals, as acknowledged in SGS v. Philippines, the Committee considers it appropriate to take those decisions into consideration, because their reasoning and conclusions may provide guidance to the Committee in settling similar issues arising in these annulment proceedings and help to ensure consistency and legal certainty of the ICSID annulment mechanism, thereby contributing to ensuring trust in the ICSID dispute settlement system and predictability for governments and investors."

[14]See also the Energy Charter Treaty: http://www.encharter.org.

European Union agreements which would sensibly include both direct investment *and* portfolio investment would have to be concluded jointly by the European Union and its 27 member states and the respective third state.[15] Furthermore, future European investment treaties would also normally have to formulate standards of treatment for areas for which the internal market of the European Union would probably not be competent even "after Lisbon," such as tax law and the systems of property ownership of the member states.[16]

This means, in practice, that European Union investment treaties could be concluded as *mixed treaties*, i.e. with the involvement of the member states, if and when their content can meaningfully "exceed the sphere of competence of the European Union and reaches into the area of competence of the member states."[17] Therefore, in the case of European investment protection, the member states and the European Commission depend upon each other.

Third Thesis: What does this mean for the formulation of European investment protection? What are the consequences for the implementation of the Lisbon Treaty, for the consideration of possible conflicts of interest and for the interplay between existing investment treaties of the member states, on the one hand, and the future competence of the European Union, on the other hand?[18]

From a foreign trade perspective,[19] a guiding principle should be the maintenance and linking of the undisputed advantages of both systems for the benefit of the European Union and its member states. So far, more than 1,500 bilateral investment treaties with third states in existence in Europe – above all those of capital-exporting countries such as the UK, France, Italy, the Netherlands, Belgium, Luxembourg and Germany – have fulfilled their task well. Against this background, it should, therefore, *also* be in the interest of the *European Union* to continue to guarantee existing foreign investments through these investment treaties.

These treaties should remain in place to preserve the advantages of their tried-and-tested protection standards and arbitration mechanisms. This also corresponds to the investors' and third countries' desire for legal certainty as investment treaties actually guarantee a higher degree of legal certainty than customary international

[15]Tietje, Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon, in: Tietje/Kraft (eds.), *Beiträge zum Transnationalen Wirtschaftsrecht, Heft 83*, 2009, p. 16.

[16]Art. 345 TFEU; see also the "harmonization precept," Art. 207 Para. 6; Art. 113, 114 Para. 2 TFEU.

[17]Nettesheim, Kompetenzen, in: v. Bogdandy (ed.), *Europäisches Verfassungsrecht, Theoretische und dogmatische Grundzüge*, 2009, (2nd edition) p. 415 (432 et seq.).

[18]In general, see Ceyssens, Towards a Common Foreign Investment Policy?–Foreign Investment in the European Constitution, Legal Issues of Economic Integration 32 (2005) 3, pp. 259–291; Karl, The Competence for Foreign Direct Investment–New Powers for the European Union?, 5 The Journal of World Investment & Trade 5 (2004) 3, pp. 413–448; Shan, Towards a Common European Community Policy on Investment Issues, Journal of World Investment 2 (2001) 3, pp. 603–625; Griebel, Überlegungen zur Wahrnehmung der neuen EU-Kompetenz für ausländische Direktinvestitionen nach Inkrafttreten des Vertrages von Lissabon, RIW (2009), p. 469.

[19]German companies alone have invested a total of approximately €800 billion abroad.

law. After all, the legal situation according to European Union law may not influence the existing effectiveness in international law of these treaties of the member states.[20] The ongoing existence in international law of bilateral investment treaties should, therefore, be maintained as long as no adequate subsequent system exists.[21]

Fourth Thesis: Within the framework of new competences "after Lisbon" the member states, together with the Commission, need to vigorously support the negotiation of European investment treaties or substantial investment chapters within free-trade agreements. In addition to appropriate standards of protection,[22] improving access to foreign markets for European investors ("*pre-establishment*" and "*market access*") should be an important aim of these negotiations.

This is all the more important against the background of an apparent change in attitude towards the protection of investment in certain parts of the world. The long and extensive experience of member states in international investment protection

[20]In detail, see Johannsen, Die Kompetenz der Europäischen Union für ausländische Direktinvestitionen nach dem Vertrag von Lissabon, in: Tiejte/Kraft/Lehmann (eds.), *Beiträge zum Transnationalen Wirtschaftsrecht, Heft 90*, 2009, p. 22, with further references.

[21]For an express approval of the Council regarding the continuance of the investment treaties of the member states see the German Federal Constitutional Court Ruling of June 30, 2009, Paras. 377–380: "The continued legal existence of the agreements already concluded is not endangered. International agreements of the Member States that were concluded before 1st January 1958 shall in principle not be affected by the Treaty establishing the European Community (Art. 307.1 TEC; Art. 351.1 TFEU). In many cases, this provision is not directly applicable because bilateral investment protection agreements have, as a general rule, been concluded more recently, but the legal concept exists 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 (see Bernhardt, Die Europäische Gemeinschaft als neuer Rechtsträger im Geflecht der traditionellen zwischenstaatlichen Beziehungen, EuR (1983), p. 199 (205); Schmalenbach, in: Calliess/Ruffert, TEU/TEC, 3rd ed. 2007, Art. 307 TEC, Margin no. 5). With a view to the mixed competence in investment issues, the existing investment protection agreements must be authorized by the European Union (see Council Decision of 15 November 2001 Authorising the Automatic Renewal or Continuation in Force of Provisions Governing Matters Covered by the Common Commercial Policy Contained in the Friendship, Trade and Navigation Treaties and Trade Agreements Concluded between Member States and Third Countries, OJEU 2001 L 320/13). This corresponds to the current practice, expressly declared or tacitly practiced, concerning the continued validity of international agreements concluded by the Member States." The legal view, which can be understood from Art. 351 Para. 1 TFEU (ex Art. 307 Para. 1 Treaty of Rome), is that a legal situation in the member states would not, in principle, be affected by a later step towards integration, cf. Tietje, Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon, in: Tietje/Kraft (eds.), *Beiträge zum Transnationalen Wirtschaftsrecht, Heft 83*, 2009, p. 18.

[22]Such as the principle of non-discrimination or the basis of fair and just treatment. Higher standards of protection, similar to those provided by the German bilateral investment treaties, will in all likelihood not be included in the negotiating mandate owing to maintenance of the principle of consensus as there is a possible conflict of interests amongst the 27 European Union member states between capital-exporting and capital-importing states.

can be utilized profitably within the framework of such negotiations and the conclusion of treaties.

In this context the following considerations, which have their precursors in the development of Community law, should be examined[23]: One possible form could involve the European Union concluding a framework investment treaty with third states, leaving the details of the investment protection guarantees to the member states, not least to take into account special political/historical factors within the relationship of the individual European Union state with third countries.[24] This graduated combination of treaties with various levels has already been described as the Commission's "*multi-level governance reflected in a multi-level conclusion of international agreements*,"[25] a description which is equally well suited to the introduction recommended here of complementary, European investment protection.

Fifth Thesis: The idea and principle of most-favoured treatment should apply concerning the relationship between existing treaties of the member states and future European investment treaties, as is already the case in European free-trade agreements or in various directives in European law. In the "*Minimum Platform on Investment*," which the Council adopted on 27 November 2007 and which was renewed on 6 March 2009, (even before the Lisbon Treaty came into effect), the member states had already expressly stated the following concerning existing and future investment protection treaties:

> Article ["Other Agreements"]: Nothing in this title shall be taken to limit the rights of investors of the Parties to benefit from any more favourable treatment provided for in any existing or future international agreement relating to investment to which a Member State of the Community and [a 'region' or country] are parties.[26]

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[23]Burgstaller, European Law and Investment Treaties, Journal of International Arbitration 26 (2009) 2, p. 181 (215).

[24]Something similar was provided for in the investment chapters – this was, however, "before Lisbon": Art 21 No. 2 [Promoting Investment] of the EU-Chile Association Agreement: "Cooperation will cover in particular the following: (b) developing a legal framework for the Parties that favours investment, by conclusion, where appropriate, of bilateral agreements between the Member States and Chile to promote and protect investment and avoid dual taxation," http://trade.ec.europa.eu/doclib/docs/2004/november/tradoc_111620.pdf; Art. 50 of the Agreement Euro-Med Countries, http://trade.ec.europa.eu/doclib/docs/2006/march/tradoc_127986.pdf; Art. 21 Cotonou Agreement; Eilmansberger, Bilateral Investment Treaties and EC Law, Common Markets Law Review 46 (2009), p. 383 (393).

[25]Kuijper, Fifty years of EC/EU external relations: Continuity and the dialogue between judges and member states as constitutional legislators, Fordham Int'l L.J. 31 (2007–2008), p. 1571 (1597); regarding international trade policy: Petersmann, Multilevel Judicial Governance of International Trade Requires a Common Conception of Rule of Law and Justice, J. Int'l Econ. L. 10 (2007) 3, p. 529.

[26]Council of European Union, 15375 / 06 [unpublished], revised version of 6 March 2009; see also the suggested formulation by Karl, The Competence for Foreign Direct Investment–New Powers for the European Union?, The Journal of World Investment & Trade 5 (2004) 3, p. 413 (448) for an European Union investment protection treaty: "The parties to the treaty undertake to respect all other obligations to the other treaty partner regarding the investments of an investor. The EU can ensure that the member states observe their obligations to the parties to the treaty. This includes,

Thus, we would arrive at a complementary and interrelated European system of investment protection which would sensibly combine the benefits of both the existing investment treaties of the member states and the future free-trade agreements of the European Union. The new competences would generate further advantages if, for example, the European Commission succeeds in its negotiations with China and other large economic areas in its aim to achieve better, and mutual, *market access* for investors and thereby, in this respect, emulate the classic bilateral investment protection model of the USA.

Sixth Thesis: And finally, the following aspects have to be considered:

- An arbitration clause, at least regarding the *arbitral tribunals of the World Bank (ICSID)*, could not be included in a European Union investment treaty, so an investor from a third country could not initiate ICSID proceedings against the European Union following such an agreement. According to Art. 67 of the ICSID Convention, any new entrants have to be members of the World Bank ("*for signature on behalf of States member of the bank*") or of the Statute of the International Court of Justice. The entry of a regional association such as the European Union is not possible.[27] Finally, Art. 66 of the ICSID Convention requires the *unanimous* agreement of all ICSID member states for any amendment to the ICSID Convention.
- "After Lisbon" a common trade policy will be much more strongly anchored in the principles and aims of the foreign trade policy of the European Union as a whole. With the reference in Art. 205 TFEU to Art. 21 Para. 2 TEU (Para. 3 Subsection 3, new version) the aims of economic liberalization contained in Art. 206 TFEU (Art. 131 Treaty of Rome) also result explicitly in the application and integration of these values in a common trade policy. The *values* anchored in the coherence policy regarding the international dealings of the European Union include "democracy, the rule of law, human rights, the principles of international law, the Charter of the United Nations, sustainable development, integration of developing nations in the world economy, protection of the environment and global governance."
- The *European Parliament* must be involved before any such agreement is concluded and, according to Art. 218 Para. 6 TFEU, the approval of the European Parliament is required in the case of new agreements. In any case, it has been apparent for some time that the European Parliament has been gaining in self-confidence in this area and has dedicated itself increasingly to technical questions concerning a common trade policy and has, thereby, clearly begun to prepare for the new legal situation following the entry into force of the Lisbon Treaty. This will require increased coordination

e.g. obligations arising from a BIT with individual member states or from other investment protection agreements with an investor of the other treaty partner."

[27]Art. 2 Para. 1 IBRD Articles of Agreement in conjunction with Art. II Agreement of the International Monetary Fund; Art. 34 Para. 1 ICJ Statute, Federal Law Gazette 1973 II, p. 505.

and harmonization from all parties involved – the member states, the Commission and the Council.

- Finally, it is necessary to clarify the question of *responsibility* and *liability* within the framework of mixed agreements. As in this case both the European Union and the member states are treaty partners in a mixed agreement, they bear joint liability. Within the framework of an investment agreement this liability would basically be linked to "reasonable" state behaviour.[28] Joint and several liabilities would only emerge in the case of a member state invoking European Union law as only then could *both* the European Union and the member state be considered as being potentially in breach of contract.

However, in the case of a mixed agreement, the member states and the European Union could only limit or divide their responsibility in international law amongst themselves by means of a specific declaration. Numerous treaties expressly require this: Annex IX Art. 4 of the United Nations Convention on the Law of the Sea (UNCLOS),[29] Art. 24 II and III of the Kyoto Protocol and, finally, in the ratification declaration to Art. 26 of the Energy Charter Treaty.[30]

Such a declaration concerning the limitation of responsibility would also be desirable in mixed investment agreements in order to avoid the duplication of legal action and to protect the member states from any duplication of liability owing to their being held responsible in international law for the execution of European Union law, thereby possibly infringing Community law due to the settlement of an arbitral ruling.

Seventh Thesis: It is high time, following the planned transfer of competences, for the cooperation between the member states and the Commission to be provided with an institutional framework – similar to that which exists in trade policy – and comparable with the previous Art. 133 and future Art. 207 committee on trade

[28]Fair and just treatment, no discrimination, observance of concluded treaties, etc.

[29]Annex IX Art. 4 UNCLOS: "1. The instrument of formal confirmation or of accession of an international organization shall contain an undertaking to accept the rights and obligations of States under this Convention in respect of matters relating to which competence has been transferred to it by its member States which are Parties to this Convention. 2. An international organization shall be a Party to this Convention to the extent that it has competence in accordance with the declarations, communications of information or notifications referred to in Article 5 of this Annex. 3. Such an international organization shall exercise the rights and perform the obligations which its member States which are Parties would otherwise have under this Convention, on matters relating to which competence has been transferred to it by those member States. The member States of that international organization shall not exercise competence which they have transferred to it."

[30]Regarding this, see Eilmansberger, Bilateral Investment Treaties and EC Law, Common Markets Law Review 46 (2009), p. 383 (396 fn. 70).

policy, in which all of these questions can be dealt with appropriately between those concerned.

The creation of such a complementary and correlated system of investment protection is demanding. It requires a prudent dialogue between those involved at European Union level in order to really enable advantage to be taken of the possibilities of such a system and the possible negotiating power of the European Union and, therefore, to engage in the competition between the legal systems[31] with other economic blocks also in this regard.

[31]Regarding this, see Bungenberg, Außenbeziehungen und Außenhandelspolitik, in: Schwarze/Hatje (eds.), *Der Reforvertrag von Lissabon, EuR Beiheft 1*, 2009, p. 195.