EUROPEAN UNION PUBLIC POLICY ON FOREIGN DIRECT INVESTMENT*

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The European Union Policy for Investment addresses the issue of sustainable and inclusive development through the lens of private sector-led development. The policy looks at all forms of investment involving all types of firms. A good investment climate is one which provides opportunities for all investors: public and private, large and small, foreign and domestic. The policy could be non-prescriptive, as it is impossible to find an approach that suits all the countries within the EU. The Member States have different private sector development and economic sustainability and efficiency. The policy recognizes the role of competition in relation to the principle of non-discrimination and national treatment. The importance of foreign investment is directly linked to the fact that the EU is the biggest provider and destination of FDI in the world, measured by stocks and flows. The investment creates enormous growth and numerous new jobs both at home and abroad.

1. History of the Foreign Direct Investment in the European Union

The biggest push to the foreign direct investment flow started with the collapse of communism more than 20 years ago. This event unleashed a historically unprecedented process of economic restructuring and political transformation in the former communist countries. Of course, it was a lengthy process which did not happen over a year: there was a transition period.[2] This transition process involved certain changes in the politics and in the economies of the countries involved. As an example, we can mention democratization, institution building and for the economic sector, - marketization, liberalization, restructuring. In the transition process, FDI proved to be the most effective instrument.

Further studies on the economics of the 2004 Enlargement[3] have shown that this prospect of accession has been paramount in mobilizing foreign investments, as western firms responded to the opportunities offered by the opening of the new markets by changing the geographical organization of their production thus initiating a broader process of restructuring for the European industry. As a result, these movements were part of a deeper integration process, reflecting the significant linkages that developed on

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[2]Monastiriotis, V. (2014). Origin of FDI and domestic productivity spillovers: does European FDI have a 'productivity advantage' in the ENP countries? *LSE 'Europe in Question' Discussion Paper Series,* 70/2013, http://eprints.lse.ac.uk/55267/1/LEQSPaper70.pdf [accessed May 20, 2018]

[3]Brenton, P. & Di Mauro, F. & Lücke, M. (1999). Economic Integration and FDI: An Empirical Analysis of Foreign Investment in the EU and in Central and Eastern Europe, *Empirica* 26 (2): 95-121.; Kaminski, B. (2001). How accession to the EU has affected external trade and FDI in Central European economies. *Policy Research Working Paper* No 2578, World Bank, Washington DC.; Monastiriotis, V. & Agiomirgianakis, G. (2009). The economics of the 5th enlargement: trade, migration and economic synchronicity, *Journal of International Trade and Economic Development,* 18 (1): 3-9.

the ground, which in turn facilitated sizeable technology transfers to the companies of Central and Eastern Europe. But the extent of integration with the local economies has been low, and this was related to the volumes of FDI. The countries were seeing foreign direct investment as a market-capture type and a spatial reorganization of the production system. The latest major step in FDI policy happened in 2009 with the Treaty of Lisbon, which changed the perspective of future developments entirely by giving the Union full competence over foreign investments.

2. The Treaty of Lisbon and the Member States'-BITs: the conflict and how the EU regulated them

Many years ago, with the establishing of the European Union (previously European Economic Community/European Community) a Common Commercial Policy (CCP)[4] has been created to govern the EU's trade relations with non-EU countries. The creation of a common commercial policy was a logical consequence of the formation of a customs union among its Member States. The European Union's trade policy therefore establishes common rules including, among others, a common customs tariff, a common import and export regime and the undertaking of uniform trade liberalization measures as well as trade defense instruments.

The biggest change within the FDI policy of the EU was brought by the Treaty of Lisbon in 2009, which gave the EU power, within the framework of the CCP, to make investment agreements on behalf of the Member States. In terms of new competences, the Lisbon Treaty[5] explicitly mentions "foreign direct investment" as forming part of the EU common commercial policy.[6] This includes, among others, the power to regulate investment protection. In addition, the Lisbon Treaty explicitly confirmed that the common commercial policy is an area of exclusive EU competences. This formal declaration confirms existing case-law of the Court of Justice of the European Union (hereinafter the CJEU)[7]and means that the Union alone is able to legislate and conclude international agreements in this field, including international investment.

In this case, one question arises: What to do with Member States' Bilateral Investment Treaties (BITs)? Over the last 50 years, the Member States of the EU concluded a large number of such bilateral agreements (see Figure 1). There are two types of BITs: treaties between Member States and third countries and; intra-EU agreements.

[4] The Common Commercial Policy presents regulations to govern EU's trade relation with non-EU countries. Now it includes, among others, a common customs tariff, a common import and export regime and the undertaking of uniform trade liberalization measures as well as trade defense instrument.

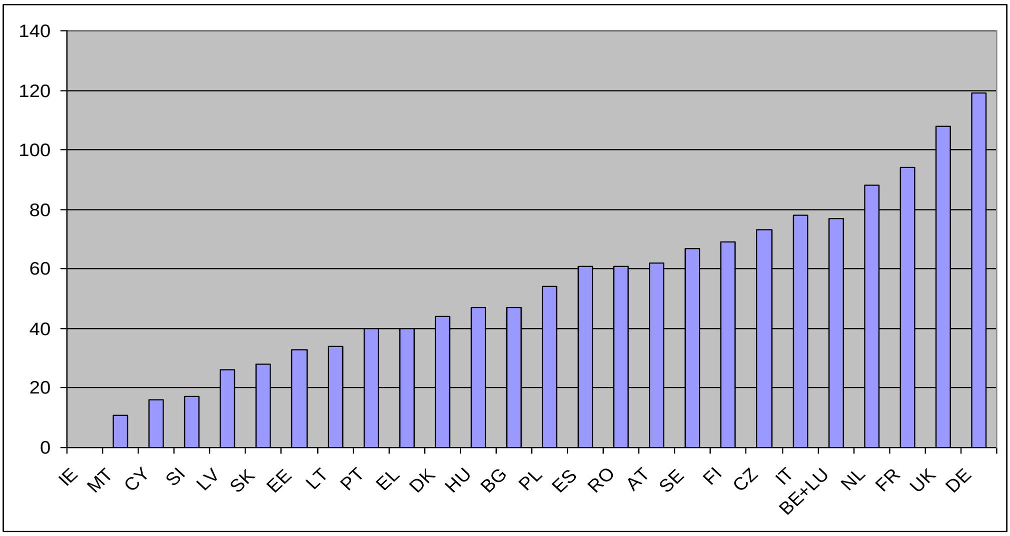
[5]The Lisbon Treaty is the latest amendment of the EU founding Treaties, entered into force in 2009. It resulted in the (current) Treaty on European Union (TEU) [OJ C 326.26.10.2012 p. 13] and Treaty on Functioning of the European Union (TFEU) [OJ C 326.26.10.2012 p. 47]

[6]See articles 206 and 207(1) TFEU

[7] See especially Opinion 1/76 'Draft Agreement establishing a European laying-up fund for inland waterway vessels' [ECLI:EU:C:1977:63]; Opinion 1/94 'Competence of the Community to conclude international agreements concerning services and the protection of intellectual property'; Opinion 2/00 [ECLI:EU:C:2001:664]

Figure 1

Overview of the number of Bilateral Investment Treaties concluded by Member States



Source: COM(2010)343 final[8]

The Regulation 1219/12 of the European Parliament and Council on establishing transitional arrangements for bilateral investment agreements between Member States and third countries (hereinafter the Regulation) addresses the steps that should be taken about existing bilateral investment agreements. It states that the bilateral agreements signed before 1st December 2009 can be maintained in force, or enter into force, in accordance with the Regulation. In addition, a few obligations are engaged for the Member States: to take necessary measures to eliminate the BIT's incompatibilities with the Union law; to amend or conclude BITs in accordance with Union law and to cooperate with the negotiations or the conclusion by the Union of a BIT with third countries.

As a general rule, the Member States should get the Commission's authorization to open formal negotiations with third countries. The Commission may require the Member State to supplement or remove from such negotiations and from the prospective bilateral investment agreement any clauses necessary to ensure consistency with the Union's investment policy or compatibility with Union law.

As for the intra-EU BITs, the main problem was that they were incompatible with the fundamental principles of the EU, more precisely, conflicts arose from restrictions on the free movement of capitals and protections granted for investment in BITs. According to the European Commission, those provisions of the Bilateral Investment Treaties were causing discrimination among Member States which were not parties in those treaties. According to the CJEU case-law, discrimination based on nationality, as declared by the

[8]European Commission (2010). *Towards a comprehensive European international investment policy.* COM(2010)343 final

EU Treaties[9] and confirmed by the case-law of the CJEU,[10] is incompatible with EU law. Thus the Union came up with the general regulation for all bilateral investment agreements of the Member States.

Intra-EU bilateral investment agreements face more problems than the agreements with third countries. The European Commission has made a bold commitment to proving that intra-EU BITs are infringing Union law. The arguments that were presented by the Commission are as follows:[11]

- The principle of *lex posterior*, which requires Member States to take actions against conflict between EU law and earlier treaties in their domestic law;
- The principle of supremacy of EU law, which means that EU law prevails over treaties concluded between EU Member States;
- Availability of equivalent investment protection under EU law;
- The principle of non-discrimination under Article 8 TFEU, which prohibits any discrimination on the grounds of nationality;
- The violation of State aid rules under EU law;
- And lastly, the exclusive jurisdiction of the CJEU on interpreting EU law and that an arbitral tribunal is not competent to seek preliminary ruling from the CJEU.

In response to the arguments of the Commission, the Member States presented the problems arising from termination of their bilateral investment agreements. Firstly, European Union investors would lose their right to benefit from the advantages of international investment arbitration for disputes arising out of their investment in a European Union Member State. The only available solution would be national courts. Thus the investors would not have complete confidence in their investments in Member States. Secondly, a number of intra-EU BITs stipulate a sunset clause, which allows protected investors to enjoy substantive and procedural protection under the BIT upon its termination for a specified period of time. And lastly, Union law has no equivalent substantive protection to intra-EU BITs since the latter generally provide a broader scope of protections, as pointed out by Advocate General Wathelet in the *Achmea v. Slovakia*[12] preliminary ruling.

3. Other novelties of the approach of the European Union towards Foreign Direct Investment

Besides having conflicts about previous multilateral and bilateral agreements of the Member States, the EU also had some new visions about FDI.

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[9]See especially Article 18(1) TFEU and in the context of the so called four economic freedoms, Part Three Title 1 TFEU

[10] See for instance Case C-467/98 Commission v Denmark [ECLI:EU:C:2002:625]

[11] Ilie, L. (2018). What is the Future of Intra-EU BITs? *Kluwer Arbitration Blog*, January 2018, http://arbitrationblog.kluwerarbitration.com/2018/01/21/future-intra-eu-bits/ [accessed May 20, 2018]

[12]Opinion of AG Wathelet in case C-284/16 Slovak Republic v. Achmea BV [ECLI:EU:C:2017:699], para 205., in the view of the arbitral tribunal, investment protections under Intra-EU BITs were neither covered nor applied in the same scope as under EU law. Furthermore, European Union law did not grant access to investment arbitration or an equivalent provision that would allow a EU investor to bring a claim against EU Member State.

The two major agreements that EU is working on are the CETA (Comprehensive Trade and Economic Agreement) with Canada and the TTIP (The Transatlantic Trade Investment Partnership) with the USA.

CETA is a new trade agreement between the EU and Canada. On 21 September 2017 CETA entered into force provisionally.[13] As such, most of the agreement now applies. National parliaments in EU countries – and in some cases regional ones too – will then need to approve CETA before it can take full effect. In the case of TTIP, the trade and investment negotiations with the US are in process since 2013.

The EU has recently made clear that it is determined to move away from its previous system of investor-state dispute settlement (ISDS), as its ad hoc nature does not sufficiently guarantee impartiality and predictability. That is why, after a long and thorough debate with all relevant stakeholders, the EU replaced ISDS in all its negotiations with a permanent Investment Court System.[14] The Commission says that the Investment Court System in EU trade and investment agreements already addresses all the main shortcomings identified in the old ISDS system. But due to its bilateral nature, it only applies to the specific parties to each agreement. It can't address the problems outlined above at a global level. For example, it does not cover the many Member States' agreements. Moreover, it would be much more efficient to have just one, multilateral institution to rule on investment disputes covered by all the bilateral agreements in place.

The proposal for the new court system includes major improvements such as:[15]

- a public Investment Court System composed of a first instance Tribunal and an Appeal Tribunal would be set up;
- judgments would be made by publicly appointed judges with high qualifications, comparable to those required for the members of permanent international courts such as the International Court of Justice and the WTO Appellate Body;
- the new Appeal Tribunal would be operating on similar principles to the WTO Appellate Body;
- the ability of investors to take a case before the Tribunal would be precisely defined and limited to cases such as targeted discrimination on the base of gender, race or religion, or nationality, expropriation without compensation, or denial of justice;
- Governments' right to regulate would be enshrined and guaranteed in the provisions of the trade and investment agreements.

This builds on the EU's existing approach which ensures:

- proceedings will be transparent, hearings open and comments available on-line, and a right to intervene for parties with an interest in the dispute will be provided;
- Forum shopping is not possible;

[13] http://ec.europa.eu/trade/policy/in-focus/ceta/ [accessed May 20, 2018]

[14] European Commission (2017). *A Multilateral Investment Court,* http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf [accessed May 20, 2018]

[15] The main elements of the reform can be found in the communications that Union made since the negotiations of CETA http://trade.ec.europa.eu/doclib/press/index.cfm?id=1364 [accessed May 20, 2018]

- Frivolous claims will be dismissed quickly;
- A clear distinction between international law and domestic law will be maintained;
- Multiple and parallel proceedings will be avoided.

4. Conclusions

It can take decades to finally stabilize the investment policy of the Union. The reform steps taken by the EU towards new regulations on investment have shown the Union's determination. Regardless of the, numerous problems, including previous, agreements that the EU is dealing with, the process itself is quite successful. After long-term negotiations, the multilateral agreements of the Union are waiting for approval from Member States' Parliaments, and the proposal regarding the single judicial system is getting positive feedback from the observers. The single judicial system is striving to live up to the standards set by international tribunals', and this is evidenced by the use of approaches developed by the WTO.

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