

# Designing a coherent European Community Investment (and Trade) Policy

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## Overview

- Multilateral Agreement on Investment
- Assessment of bilateral Investment agreements
- Investment regulation at the regional level

# Complexity of EC investment policy

- Fragmentation of international investment law is known
  - Perhaps a key issue in international economic law: nowhere else is seen a such fragmentation
  - MAI is not possible
  - It is worthwhile to look at one of the most dynamic area: EC
- Fragmentation of international investment regulation
  - Multilayered: various levels of agreements (bilateral, regional, sectoral, plurilateral and multilateral)
  - Diversified substance: consent to investor-State, non-discrimination with respect to the admission of foreign investors, prohibitions of certain performance requirements... (China national treatment)
- Fragmentation at the European Level
  - Right for any EC entity to make an investment in any other EC member country (CML art. 43 Rome Treaty)
  - However EC member states kept control over FDI relations with third countries: BITs

# Complexity of EC investment policy

- Investment Provisions in EU FTAs, Why ?
  - Art. 57 EU competence to adopt measures with regard to the **establishment of foreign investors in the Union**
  - This includes adoption of internal EU legislation and conclusions of IIAs
  - For instance EC FTAs
  - Innovative EU FTAs: facilitation of administrative procedures, improve protection of IP...
- But no definition of investment, it is left to national BITs...
  - Member States do not have the right to conclude IIAs on the establishment of FDI
  - for this reason national BITs are limited in scope to post-establishment treatment

# Complexity of EC investment policy

- EC alone concludes FTAs
    - i.e. trade agreements including investment-related provisions
  - EC + Members conclude
    - partnership/cooperation agreements (specific to EC acceding countries)
  - 27 Member States alone conclude BITs
    - covering post-establishment issues: protection of FDI, discrimination, expropriation
    - dispute settlement
- Lack of coherence in terms of regulation layers

# High contribution to BITs proliferation

- Number of national BITs (June 2007):
  - 2573 is the total of all BITs
  - 1299 is the total number of “European BITs”
    - **50% of worldwide BITs are “Europeans”**
    - Germany ranks first (134)
    - Spain, Belgium, Finland among the most active last 2 years
    - Europeans, but **diversified** (investment definition, umbrella clause...) and contributing to complexity
    - Lack of coherence in terms of contents
      - For the EC : conditions of competition abroad
      - and its partners (China does not have the same protection in the 27)

# Fragmentation at the European Level

- Identification of a legal competence issue  
(different layers and contents of regulation)
- Simultaneous competence problem for EC itself because of the Disconnection trade / investment
  - Trade is a EC exclusive (and efficient) competence
  - Investment remains largely a national competence

# Fragmentation at the European Level

- Treaty of Lisbon (December 2007) brought progress
  - Extension of EC competence to ‘FDI’.
  - Harmonization of BITs becomes possible: towards a new generation of approx. 177 EC BITs (rather than 1299)
  - Voting requirements “reasonable”:
    - **qualified majority** as a legal principle...but consensus in practice
    - ...except where IIAs “include provisions for which unanimity is required for the adoption of internal rules” (188 C §4)

# Strengthened EC economic policy and effects at global level

- Improved negotiating power at the bilateral level
- Broader scope of FTAs negotiations
- Multilateral level :
  - From unanimity to majority
  - Increasing attractiveness of EC as an investment location
- Political identity of the EU
  - First regional entity to develop investment policy
  - Inspiration for other regional organization (ASEAN, MERCOSUR?)

# ASEAN?

- The problem for ASEAN, of course, is that bilateral agreements bypass regionally orchestrated agreements such as the ASEAN Investment Area (AIA) and pose the risk of marginalizing ASEAN.
- much will depend on the outcomes of the long awaited ASEAN Comprehensive Investment Agreement (ACIA) which is set to supersede the present investment regional framework. This new ASEAN investment agreement should be formalized in the next months.

## What will become possible (proposals)

- Need to create European Investment Guarantee Agency
  - Compensation of national investors abroad
- Arbitration: amendment of ICSID Charter is needed: no supra-organization allowed ! (Ven / Zim)
- Extension of the existing Trade Barriers Regulation to investment
- Harmonization and more: adapting new (generation) BITs to the needs of modern economy
  - Facilitation of administrative procedures (existing in FTAs)
  - Closer link trade / investment
  - Including IP protection?

# Thank You

## Research results EC investment policy project

- J. Chaisse, 'Building a coherent external economic policy for the EC - Trade and investment in the same hand', NCCR Working Paper No. X/2008.
- J. Chaisse, 'Adapting the European Community Legal Structure to the International Trade', 17 (6) European Business Law Review (2006) 1615-1635.
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