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Policy Brief December 2008

The EU as a Maker of Investment Agreements: the Potential Impact on Canada and the Broader World System of Bilateral Investment Treaties

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In 2005, Canada-EU negotiations began again for a comprehensive bilateral Trade and Investment Enhancement Agreement (TIEA) which eventually led to a joint study on the benefits of an even more ambitious economic partnership released at their 2008 Summit in Quebec City.[1] Based on the report's positive assessment,[2] the two sides aim to launch negotiations on economic integration in early 2009.[3]

The EU is Canada's second largest partner both in trade and investment, while Canada is the EU's eleventh largest trading partner, but fourth largest investment partner after the US, Switzerland and Japan.[4] Their formal economic relationship began in 1959 and later they signed a *Framework Agreement for Commercial and Economic Cooperation* in 1976.[5] This created a structure for ongoing dialogue that led to the conclusion of several sectoral agreements covering everything from wine to nuclear research to customs cooperation.[6]

Over the years, Canada has also concluded Foreign Investment Promotion and Protection Agreements (FIPAs) with six countries that became EU members in 2004. These are standardized bilateral agreements but they still required separate negotiations with each country. Pursuant to the Accession Agreements to the EU, further negotiations began to amend these FIPAs to comply with EU law, but have still not been finalized.[7] However, given the activity at the EU-Canada level, their continued relevance appears increasingly questionable, and Canada could now save itself the effort required of multiple parallel negotiations and focus on an agreement with the EU that will likely provide substantially the same benefits and more.

When the original Member States of what today we call the European Union (EU) came together in the 1950s to build common institutions, their goals centred on the free movement of all the factors of production to create a single customs union and a common market.[8] As for external competences, the original *Treaty Establishing the European Community* (*ECT*)[9] only gave the supranational body the power to conclude commercial agreements under the Common Commercial Policy (CCP),[10] Association

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Agreements, and agreements covering areas within the EU's internal competence[11] such as those on common customs tariffs, agriculture and fisheries.[12] But half a century of treaty amendments, European Court of Justice (ECJ) rulings, and European Commission legislation pursuant to the treaties have gradually shifted authority from national capitals to Brussels with the last two decades in particular witnessing exponential growth in the scope of EU external relations law.[13] While jurisdiction over foreign investment was not envisaged at the outset, increased regulation of capital movements and vastly increased monetary cooperation after the 1997 *Treaty of Amsterdam* has led the Commission and many commentators to suggest that EU jurisdiction over foreign investment matters should be clarified and greatly expanded and possibly made exclusive.

The Growth of EU External Competence

ECJ rulings in the 1970s laid the groundwork for a powerful CCP by giving it an expansive interpretation and declaring it within the EU's exclusive jurisdiction.[14] The Court argued that this was necessary to allow for a coherent and effective defence of EU commercial interests abroad and to prevent the distortion of competition within the single market. It pointed to the CCP's non-exhaustive enumeration and said its scope goes beyond the liberalization of trade,[15] reflecting the intimate link that connects trade and investment despite their traditional separation in treaty-making.

Subsequent rulings in the 1990s took a less liberal tone,[16] but the *Treaty of Nice*, in force since 2003, added trade in services and trade in the commercial aspects of intellectual property to the CCP, albeit without exclusivity.[17] These are explicit external competences that lie at the core of many foreign direct investment (FDI) ventures. Meanwhile, the EU has always had the power to enforce the free movement of capital between EU Member States and third countries.[18] Its internal competence over establishment rights[19] and the free movement of services[20] has become the basis for an external competence over regulating the pre-establishment phase of trade in services.[21] For example, the European Commission now plays a substantial role in regulating international financial services and has the authority to negotiate air transport agreements on behalf of Member States with third countries.[22]

Competence over Investment Agreements

The EU's Member States have been some of the most prolific Bilateral Investment Treaty (BIT) makers, with Germany leading the pack at over 130 and Britain and France not far behind. But now they may no longer be able to conclude un-truncated FDI agreements covering the usual full panoply of foreign investment protection rights. The trend has therefore been toward shared competence or 'mixed' agreements such as the *WTO Agreement*, the *Energy Charter Treaty*, and various Association Agreements[23] such as the 2002 "*Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part*".[24] Article 21 of this agreement, the main article dealing with investment, emphasizes that the Parties are to act "within the bounds of their own competence" and the EU Member States and Chile may conclude separate bilateral agreements "where appropriate".

Other notable Agreements with similar provisions include those signed with Mexico in 1997 and with Egypt in 2004, and others expected with the Mediterranean Region, Columbia, Peru, South Korea and India.[25] They tend to touch on virtually all economic matters including trade, investment, intellectual property, technical regulations and standards, competition policy and even taxation, and increasingly non-economic matters over conflict of laws, criminal law and human rights law.[26] The EU's official policy seeks to complement existing Member State BITs, following the standard BIT principles of improving

market access, investment-related capital flows, the movement of 'key personnel', and national treatment.[27]

But the Commission has been pushing for an exclusive competence to conclude treaties over FDI since 1996.[28] Both the 2004 *European Constitution* and 2007 *Treaty of Lisbon* finally included an EU mandate over FDI, but either has yet to become law. However, along with the recent treaty practises described above, they nevertheless reflect the strengthened political will to streamline the EU's activity in this area. The logic of the need for a coherent exercise of existing EU competences is very strong, given the danger of allowing each Member State to pursue its own narrow advantage disregarding the consequences for others, and the advantages of speaking with one voice on FDI matters in the world. Consequently, the pressure is increasing to allow the Commission to be the primary actor in the negotiation of new BITs and trade agreements including FDI protection chapters.[29] Having the EU as a primary actor in the making of BITs represents a significant reconfiguration of the dynamics of international foreign investment law. Over the years it is difficult to calculate the full consequences but they will surely be major.

In fact, the Commission has been active in forcing both newer and older Member States to renegotiate existing BITs to conform with EU law,[30] some of which suddenly became intra-EU agreements following the accessions in 2004 and 2007, as discussed. But given the highly investor-friendly climate already provided for within the EU, intra-EU BITs are largely redundant instruments and one might expect them to be terminated after running their course. The same could be said of a growing number of extra-EU BITs, such as those involving Canada, as the Commission continues to take the initiative in concluding mixed agreements around the world that cover investment.

A final agreement between Canada and the EU is likely more than a year away, during which time the *Treaty of Lisbon* or some alternative may or may not be in place within the EU. Either way, and despite the continued existence of its FIPAs with certain EU countries, Canada must be prepared to treat the EU as a single unit for the purposes of negotiating either a new BIT or an investment chapter in any future trade agreement.

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[1] Bilateral Trade Issues: Canada, European Commission, online at <http://ec.europa.eu/trade/issues/bilateral/countries/canada/index_en.htm>; 2008 Canada-EU Summit Statement, online at <http://international.gc.ca/missions/eu-ue/summits_sommets/summit_quebec-2008_joint-declaration-eng.asp> [*Quebec Summit*].
[2] The report says that liberalized trade in goods and services has the potential to boost Canada's economy by $12 billion within seven years, *see Joint Study* at vi.
[3] Quebec Summit, *supra*.
[4] P.S.R.F. Mathijsen, *A Guide to European Union Law, 9th Ed.* (London: Sweet and Maxwell, 2007) at 511 [*Mathijsen*]; EU-Canada Joint Study, online at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/EU-CanadaJointStudy-en.pdf> at ii [*Joint Study*].
[5] *Joint Study* at iv.
[6] *Framework Agreement for commercial and economic cooperation between the European Communities and Canada*, Treaty Office Database, European Commission, online at <http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=267>.
[7] *Joint Study* at 137-138.
[8] Nigel Foster, *EU Law Directions* (Oxford: Oxford University Press, 2008) at 10 [*Foster*].
[9] Consolidated Version of the Treaty Establishing the European Community, *Official Journal C 321 E/1, 29/12/2006*, Art. 133(6)(2), online at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:pdf> [*ECT*].
[10] Arts. 131-133 *ECT*.
[11] Arts. 300, 310 *ECT*; Case 12/86, *Meryem Demiret v. Stadt Schwabisch Gmund*, [1987] ECR 3719 at para. 9; Case 22/70, *Commission v. Council* (*European Agreement on Road Transport*), [1971] ECR 263; *See* Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials*, 4th ed. (Oxford: Oxford University Press, 2008) at 97 [*Craig*].
[12] *Foster*, at 20.

[13] Piet Eeckhout, "A Panorama of Two Decades of EU External Relations Law", in Anthony Arnull, Piet Eeckhout & Takis Tridimas, *eds.*, *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Oxford: Oxford University Press, 2008) at 323 [Eeckhout].
[14] *Opinion 1/75* (*Understanding on a Local Cost Standard*) [1975] ECR 1355; *Opinion 1/78* (*International Agreement on Natural Rubber*) [1979] ECR 2871 at para. 45 [*Opinion 1/78*]; *See Craig* at 183.
[15] *Opinion 1/78*, *ibid.* at paras. 43-53.
[16] *Opinion 1/94* (*WTO Agreement: GATS and TRIPS*), [1994] ECR I-5267 [*Opinion 1/94*]; *Opinion 2/92* (*OECD - National Treatment Instrument*), [1995] ECR I-521 [*Opinion 2/92*].
[17] In fact, most of the EU's external competence is now joint or shared in nature; *see Craig*, at 223; Lorenza Mola, "Which Role for the EU in the Development of International Investment Law?" (2 July, 2008) *Society of International Economic Law (SIEL) Inaugural Conference* at Section 3.1, online at <http://ssrn.com/abstract=1154583> [*Mola*].
[18] Arts. 56-60 *ECT*.
[19] Art. 47(2) *ECT*.
[20] Art. 49 *ECT*.
[21] *Opinion 1/94*; *Opinion 2/92*; *Mola* at Section 3.1.
[22] *See generally* P. Dempsey, *European Aviation Law*, (The Hague: Kluwer Law International, 2004).
[23] Jan Ceyssens, "Towards a Common Foreign Investment Policy? – Foreign Investment in the European Constitution" (2005) 32:3 L.I.E.I. 259 at 268 [*Ceyssens*]; *Mola* at Section 2.1.
[24] online at <http://trade.ec.europa.eu/doclib/docs/2004/november/tradoc_111620.pdf>.
[25] *See generally* Bilateral Trade Relations, European Commission, online at <http://ec.europa.eu/trade/issues/bilateral/index_en.htm>.
[26] *Eeckhout* at 323.
[27] *Trade and Investment: European Union Policy on Foreign Direct Investment*, European Commission, online at <http://ec.europa.eu/trade/issues/sectoral/investment/index_en.htm>.
[28] *Ceyssens* at 269.
[29] Allan Beattie, "Brussels Seeks Greater Power in Foreign Deals" *Financial Times* (12 March 2008) 9; *Mola* at Section 3.
[30] The Central Eastern European countries did so upon accession in 2004, and the Commission has taken infringement proceedings against Austria, Sweden and Finland; *see* Anca Radu, "Foreign Investors in the EU – Which 'Best Treatment'? Interactions Between Bilateral Investment Treaties and EU Law" (March 2008) 14:2 Eur. L.J. 237 at 241 [*Radu*].