



Investment Regimes in the EU-MERCOSUR Negotiations

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contents	_page
1. Imposing International Investment Regimes between the European Union (EU) and the Common Market of the South (MERCOSUR)?	2
2. The Regulatory Status Quo of Foreign Direct Investments in the four MERCOSUR Member States	3
3. Regimes in the EU-MERCOSUR Negotiation Poker: Analysis of the Period from March 2004 to October 2004	6
4. Bilateral Investment Agreements versus Development Promoting Policy-Making	17
5. Conclusions	22
6. Bibliography	23

I. Imposing International Investment Regimes between the European Union (EU) and the Common Market of the South (MERCOSUR)?

After the 'collapse of Cancún' in September 2003, bilateralism, as represented by free trade agreements (FTAs), preferential-trade agreements (PTAs) and bilateral investment-treaties (BITs), is seen as a logical alternative to the multilateralism of the World Trade Organisation (WTO). There are 282 preferential trade agreements worldwide, 255 of which are *reciprocal* trade agreements, and 27 *non-reciprocal* (i.e. unilaterally granted trade privileges). 192 reciprocal trade agreements are *intra-regional* and 63 *inter-regional*.¹ UNCTAD estimates speak of 2,300 bilateral trade agreements worldwide as of July 2004.

Those who view multilateralism and bilateralism as opposing concepts tend to overlook that rather than exclude each other, they are complementary.² The WTO article I GATT from 1947 defines the most-favoured nation principle (MFN), according to which a WTO member state granting trade preferences to another member state has to grant the same preferences to all other WTO member states.³ However, article XXIV GATT 1947 provides an exception, insofar as theoretically the WTO rules allow regional free trade agreements provided they do not contradict WTO principles. The priority the WTO enjoys in the international trade system determines the rules for the trade-related preferences of bilateralism. In this respect, the apparent absolute opposition of 'multilateralism versus bilateralism' of the free trade agenda is rather a complementary model. Thus, in the bilateral EU-MERCOSUR negotiations, explicit references to the multilateral level of the WTO were made, too - though not formally, but as a political package deal.

This interaction of multilateralism and bilateralism is complemented by the attempt to form the increasingly perfect net of international-treaty regimes in the three sectors (trade, investment, and immaterial goods), determining in this triad the inescapable political rules for the comprehensive and worldwide arrangement of and for the market.

In free trade and bilateral investment agreements, the principles of non-discrimination and national treatment have *priority* over national, regional or local policies. Any trade relevant regulation would previously have had to prove it was the least 'discriminatory'. When it comes to establishing international, market-governed logics of utilisation - on the real floor of a world market fired by competitiveness - trade- and investment-relevant policy-making on a communal, regional or federal level represent a threat to neo-liberal market logic: the 'certainty of law' for the neo-liberal market concept might be undermined. Yet from a

¹ State April 2004, see Arashiro, Zuleika / Marin, Cynthia / Chacoff, Alejandro: *Challenges to Multilateralism, The Explosion of PTAs*, (Instituto de Estudos do Comércio e Negociações Internacionais (ICONE)), April 2004.

² See also Russau, Christian: 'Präferentielle Handelsabkommen und Exportthybris - Multi- und Bilateralismus in der politischen Freihandelsagenda zwischen EU und Brasilien', in: *FDCL EU - MERCOSUR Bulletin Nr. 2*, 3 September 2004.

³ '[...] any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties', Art.I GATT 1947.

development politics perspective⁴ it is particularly urgent to protect the scope for political action, such as the use of 'macro-economic instruments (among others capital-flow controls and protectionist measures)⁵, and it becomes absolutely indispensable from the perspective of the democratic sovereignty of states to be able to make decisions in this policy field.

These insights are the starting point for this analysis of the current negotiations between the European Union (EU) and the Common Market of the South (MERCOSUR), which places emphasis on the issues of foreign 'direct investments' (always implicitly included in the current negotiation round), and explores why a future EU-MERCOSUR agreement on 'foreign investments' threatens to *lever out the fundamental condition of the possibility for policy making with respect to foreign direct investments*. The paper examines the regulatory *status quo* for foreign direct investments in the four MERCOSUR member states (Chapter 2), before analysing the negotiation poker between the EU and MERCOSUR in the period between March and October 2004, regarding the negotiation topic 'foreign direct investments'. Chapter 4 complements this by examining the bilateral investment agreements ratified by the MERCOSUR members, and reviews the most recent developments in the special case of bilateral investment treaties signed by Brazil in the 1990s.

2. The Regulatory Status Quo of Foreign Direct Investments in the Four MERCOSUR Member States

The regulatory status of foreign direct investments in the four MERCOSUR member states is not uniform, although it is not only the harmonisation of this specific legal sector⁶ that is being discussed as an explicit objective of MERCOSUR (laid down in Chapter I, article I of the Asunción Treaty), but preferably that of as many other sectors as possible.⁷

Article 137 of the constitution of **Paraguay** establishes the regulatory hierarchy of constitution, treaties, international conventions and agreements, in descending order. In the 'investments' sector, bilateral investment agreements⁸ that have been ratified by Congress automatically supersede national laws, with the exception of the constitution. In its first three

⁴ Relating to the industrialised countries' own past, Ha-Joon Chang pointed out the active role in implementing state-controlled protectionist measures: Chang, Ha-Joon, *Kicking Away the Ladder: Development Strategy in Historical Perspective*, (London, Anthem Press, 2002). See also Zarkasy, Lyuba / Gallagher, Kevin: *Searching for the Holy Grail? Making FDI work for Sustainable Development*, WWF analytical paper, March 2003.

⁵ Mahnkopf, Birgit: 'Investition als Intervention: Wie interregionale und bilaterale Investitionsabkommen die Souveränität von Entwicklungsländern beschneiden', in: *IPG* 1/2005, p.129.

⁶ See also, among others: 'Gobierno busca generar modelo de tratado de inversiones común para el Mercosur', in: *La República*, 25 June 2005.

⁷ Capítulo I: Propósito, Principios e Instrumentos, Artigo 1: 'O compromisso dos Estados Partes de harmonizar suas legislações, nas áreas pertinentes, para lograr o fortalecimento do processo de integração.', in: *Tratado para a Constituição de um mercado comum entre a República Argentina, a República Federativa do Brasil, a República do Paraguai e a República Oriental do Uruguai*, 26 March 1991.

⁸ On bilateral trade agreements, see Chapter 4 of this paper.

articles, Law Nr. 117/91 of 6 December 1991⁹ guarantees the general national treatment of foreign investments - subject to legislation to the contrary - as well as the implementation modalities of ratified international treaties.¹⁰

Uruguay had framework modalities for foreign direct investments under the decrees Nr. 14,179 of 28 March 1974 and Nr. 808/974 of 10 October 1974, until their revocation through Law Nr. 16,906 of 7 January 1998¹¹, according to which national treatment warrants, amongst others, the explicit exclusion of any conditionals and production requirements, free capital-flow, certainty of the law, and recourse to legal action through an independent arbitration body.¹²

In **Argentina**, Law Nr. 21,382 (Law on Foreign Investments) of 2 September 1993¹³ -complemented by the provisions of Decree 1853/93 - grants general national treatment to foreign direct investments. Since Argentina has signed and ratified more than fifty bilateral investment-protection agreements - as a disastrous consequence, Argentina is currently the

⁹ 'Ley de inversiones', Nº 117/91 from 6 December 1991; in addition, the laws 69/90 and 117/91, and the decrees 19/89, 27/90 and 6361/90.

¹⁰ 'Art. 1. - El objeto de la presente Ley es estimular y garantizar en un marco de total igualdad la inversión nacional y extranjera para promover el desarrollo económico y social del Paraguay.

Art. 2o. - El inversionista extranjero y las empresas o sociedades en que éste participe, tendrá las mismas garantías, derechos y obligaciones que las Leyes y Reglamentos otorgan a los inversionistas nacionales, sin otra limitación que las establecidas por Ley.-

Art. 3o. - Las garantías, derechos y obligaciones para la inversión extranjera que el Gobierno del Paraguay haya acordado o acordare con otros Estados u Organismos Internacionales, por instrumentos bilaterales o multilaterales, serán aplicables a la inversión nacional equivalente.', in: Ley de inversiones, Nr. 117/91 from 6 December 1991.

¹¹ 'Capítulo I: Principios y garantías

Artículo 1º.- (Interés nacional).- Declárase de interés nacional la promoción y protección de las inversiones realizadas por inversores nacionales y extranjeros en el territorio nacional.

Artículo 2º.- (Igualdad).- El régimen de admisión y tratamiento de las inversiones realizadas por inversores extranjeros será el mismo que el que se concede a los inversores nacionales.

Artículo 3º.- (Requisitos).- Las inversiones serán admitidas sin necesidad de autorización previa o registro.

Artículo 4º.- (Tratamiento).- El Estado otorgará un tratamiento justo a las inversiones, comprometiéndose a no perjudicar su instalación, gestión, mantenimiento, uso, goce o disposición a través de medidas injustificadas o discriminatorias.

Artículo 5º.- (Libre transferencia de capitales).- El Estado garantiza la libre transferencia al exterior de capitales y de utilidades, así como de otras sumas vinculadas con la inversión, la que se efectuará en moneda de libre convertibilidad.', in: Ley Nº 16.906, 7 January 1998

¹² See extensively: Torrelli, Milton / Torrelli, Claudia: *Inversión Directa Extranjera en Uruguay: transnacionales europeas y agenda de la sociedad civil de cara a un acuerdo de librecomercio MERCOSUR- Unión Europea*, (Berlin, FDCL-Verlag, 2004), pp.7.

¹³ 'Artículo 1 - Los inversores extranjeros que inviertan capitales en el país en cualquiera de las formas establecidas en el Artículo 3 destinados a la promoción de actividades de índole económica, o a la ampliación o perfeccionamiento de las existentes, tendrán los mismos derechos y obligaciones que la Constitución y las leyes acuerdan a los inversores nacionales, sujetos a las disposiciones de la presente ley y de las que se contemplen en regímenes especiales o de promoción.', in: Ley de Inversiones Extranjeras from 2 September 1993.

world leader in both pending complaints, and the absolute value of compensation demands submitted to arbitration tribunals¹⁴-, the importance of these international treaties in the national legal hierarchy is considerable. In principle, according to section 22 of Article 78 of the Argentinian constitution, international treaties supersede national legislation, provided they have been ratified by Parliament. In the case of contradictory laws, higher laws come before lower laws, newer before older ones, and more specific before more general laws, though ultimately the constitution has to be respected.

The framework provisions for foreign direct investments in **Brazil** are already quite generous: Article 172 of the Brazilian Constitution stipulates that the control of foreign capital investments, promoting reinvestment, and regulating the transfer of capital and profits is the exclusive competence of the legislator, on the grounds of national interest.¹⁵ Furthermore, in Brazil the Law on Foreign Investments of 1962¹⁶ is still valid. According to its Article 2, foreign capital invested in Brazil shall receive the same legal treatment as domestic capital, and any form of discrimination or restriction not explicitly allowed under this law is explicitly forbidden.¹⁷ The modifications of 1964¹⁸ do not concern the principle of national treatment already established in 1962, but only the registration modalities for foreign capital in Brazil and the modalities for the transfer of capital and profits. Compared with many other countries, Brazil guarantees simplified capital and profit transfer. As long as the sums are registered with *SISBACEN* (Central Bank Information System), thus allowing for control by the *Banco Central* of Brazil, there are no conditions for capital and profit transfers at all. Capital transfers in the amount of the original investment are not subject to taxes and can be retransferred abroad without a special permit. Sums exceeding the original investment may also be transferred abroad at any time through *SISBACEN*, and are not subject to any transfer tax other than tax deducted at source (currently 15 percent), that is due anyway. The laws IN Nr. 243 of November 2002 and IN Nr. 321 of April 2003 allow for the control of cross-border financial flows between the foreign mother company and its domestic subsidiary to prevent cross-border profit movements (for instance via tax havens).¹⁹ Declaration of all capital and profit transfers automatically occurs online via *SISBACEN*. Infringements of this simple regulation are only possible by skipping *SISBACEN* registration; in such cases resolution

¹⁴ See extensively in Chapter 4 of this paper.

¹⁵ 'Art. 172. A lei disciplinará, com base no interesse nacional, os investimentos de capital estrangeiro, incentivará os reinvestimentos e regulará a remessa de lucros.', Constitution of the Federal Republic of Brazil 1988.

¹⁶ Foreign Capital Law, Law Nr. 4.131, 3 September 1962.

¹⁷ 'Ao capital estrangeiro que se investir no País, será dispensado tratamento jurídico idêntico ao concedido ao capital nacional em igualdade de condições, sendo vedadas quaisquer discriminações não previstas na presente lei.', Art.2, Law Nr. 4.131, September 3, 1962.

¹⁸ Amendment to Foreign Capital Law, Law Nr. 4.390, 29 August 1964: the modified articles are: 'artigos 4, 5, 7, 9, 10, 11, o parágrafo único do artigo 25, artigos 28 e 43'.

¹⁹ See: AHK Brasil / Ernst&Young: *So geht's...Besteuerungen von Unternehmen in Brasilien*, 1 Edition 2003, pp.18.

'Resolução Nº 2883 de 30 de JULHO de 2001' will apply the penal law criteria for illegal cross-border transfers of foreign capital.²⁰

The only legal restriction on the generally free capital and profit transfer to foreign countries comes into play in the case of serious balance-of-payment difficulties. Moreover, this *condition of the possibility* of the state's policy making may only be used in acute cases when safeguard measures for a *post-crisis* stabilisation of the balance of payment would come too late anyway. In spite of this, according to negotiation documents from 2004, the EU wanted to eliminate this last *sheet anchor*, marking every single corresponding restriction Brazil had brought forward in the negotiation documents with the same notorious comment: 'remove'.

3. Regimes in the EU-MERCOSUR Negotiation Poker: Analysis of the Period from March 2004 to October 2004

After signing an agreement on inter-institutional cooperation in May 1992²¹, MERCOSUR and the European Community signed a framework agreement²² on the start of negotiations on a free trade agreement. In 1997, the EU signed a similar 'fourth-generation' agreement with Mexico, which came into force in October 2000 (also called the 'Global Agreement'); and in February 2003 the association agreement with Chile, signed in November 2002, came into force.

At the summit meeting of EU, Latin American and Caribbean Heads of State and Government in June 1999 in Rio de Janeiro, the EU and MERCOSUR established the negotiation modalities such that since late 1999 both parties have been negotiating at the sessions of the 'Biregional Negotiations Committee' (BNC) on an 'inter-regional association agreement'. The negotiations follow the 'single-undertaking' principle: 'nothing is agreed, before all has been agreed'; they are formally based on the three components of 'cooperation', 'political dialogue' and 'trade issues'.

The EU Commission and the four MERCOSUR governments seem to have come to a relative consensus on the elements 'cooperation' and 'political dialogue', but there is clearly no such understanding as regards the 'trade' sector. MERCOSUR insists (not least due to enormous internal pressure from the well-coordinated agro-business) on improved access to European agricultural markets, in contrast to the market-liberal wish list of the Europeans. The EU requests:

- 'market access', 'investment securities', and legal commitment to 'national treatment' (NT) for the *investment* sectors,

²⁰ 'Define critérios para a aplicação de penalidades relacionadas ao fluxo de capitais estrangeiros', Resolução Nº 2883, 30 July 2001.

²¹ Acuerdo de cooperación interinstitucional entre el Mercado Comun del Sur y las Comunidades Europeas, Santiago de Chile, 29 May 1992.

²² Inter-regional Framework Co-operation Agreement, *Official Journal* L 069, 19/03/1996 pp. 0004 - 0022 - L 112 29/04/1999 P. 0066, http://europa.eu.int/comm/external_relations/mercosur/background_doc/fca96.htm

- general analogy with the four *GATS modes* (mode 1 *cross-border supply*, mode 2 *consumption abroad*, mode 3 *commercial presence*, mode 4 *presence of natural persons*) for the services sector,
- imposition of patents and 'geographic indicators' (GI) (for instance for wine ('Rioja') or cheese ('Parmesan')), etc, for the *Intellectual Property* sector,
- legal mechanisms to guarantee access to the MERCOSUR public-procurement market.²³

In the negotiation topic 'investments', these international negotiations affect the politically rather relevant issue of the *condition of the possibility* for decision making in the field of industrial policy of the respective countries - on national, regional and local levels. And with respect to this, binding rules consistent with the principles of general national treatment and free capital flow are very high on the EU agenda. International treaties - be they regional free trade agreements like the one currently being negotiated between the EU and MERCOSUR, or bilateral investment-agreements²⁴ - have legal priority over national, regional or local policies, so that eventually the *condition of the possibility for decision making in the field of industrial policy* might be radically curtailed if the Europeans impose their will.

During the negotiation meetings between May and September 2004, Brazil was ostensibly the most determined of the four MERCOSUR delegations to maintain the *condition of the possibility* of national industrial policies, both in the opinion of the Europeans as well as of MERCOSUR. According to the unequivocal viewpoint of Brazil, it cannot be *automatically subordinated* to international legally-binding treaties. As press reports from the past few months reveal, Argentina has not only been moving towards this position, but in the meantime is obviously planning to make even more vehement use of it than Brazil has.²⁵

At this moment, the open points on the EU-MERCOSUR negotiating agenda mainly concern the various negotiation documents (such as 'offers', 'requests', 'minimum requirements', 'side-by-side' and 'consolidated texts') that are relevant for the politically sensitive 'investments' sector. The 'offers' are made up of the horizontal as well as the specific concessions for each investment sector²⁶ (note that the services sector affects above all the area of policies and law in 'Mode 3 - Commercial Presence'²⁷), the 'requests' contain the mutual demands of the negotiating parties, and the 'minimum requirements' contain the minimal pre-condition each party demands from the other to start negotiation talks; the 'side-by-side' and 'consolidated'

²³ See Russau, Christian: 'Präferentielle Handelsabkommen und Exporthybris - Multi- und Bilateralismus in der politischen Freihandelsagenda zwischen EU und Brasilien', in: *FDCL EU - MERCOSUR Bulletin* Nr.2, 3 September 2004.

²⁴ See extensively in Chapter 4 of this paper.

²⁵ See: *Valor Econômico*, 30 August 2005.

²⁶ 'Horizontal Commitments' and 'Specific Commitments'.

²⁷ For the following see also: Russau, Christian: 'Deregulierung nationaler Märkte durch Regulierung internationaler Handelsregime. EU-MERCOSUR Verhandlungen: EU-Kommission, vertreten durch DG Trade, fordert weiterhin Liberalisierung des brasilianischen Wassermarktes, weitere Zugeständnisse bei Dienstleistungen, Investitionen und Öffentlichem Beschaffungswesen', *FDCL*, May 29, 2004.

texts are drafts and negotiation documents respectively that both sides have already revised together.

Of the few negotiation documents that have been published or leaked²⁸, Brazil's offer in the services sector of 30 March 2004²⁹ still revealed considerable reservations regarding 'investment securities'. 'Brazil's Initial Offer in Services' of 30 March 2004 was as follows:

MERCOSUR-EU | BRAZIL'S INITIAL OFFER IN SERVICES

(Footnote: *Brazil's initial offer is subject to substantial progress in the agriculture negotiations*)

I. HORIZONTAL COMMITMENTS

ALL SECTORS INCLUDED IN THIS SCHEDULE

All modes of supply:

The Brazilian Government reserves its right to suspend temporarily the commitments inscribed in this schedule of specific commitments in one(some) of the sector(s), sub-sector(s) or mode(s) of supply

Measures resulting from decisions adopted for ensuring competition are not to be considered incompatible with the specific commitments inscribed in the Brazilian schedule of specific commitments and therefore cannot be used as a basis for compensation claims for any adverse effects that they may cause to foreign services and/or service suppliers.

ALL SECTORS INCLUDED IN THIS SCHEDULE: LIMITATIONS ON MARKET ACCESS

Mode 1) Cross-border supply: Unbound

Mode 2) Consumption abroad: Unbound

Mode 3) Commercial Presence: In accordance with laws and regulations that rule foreign investments in Brazil, all foreign capital invested in Brazil must be registered with the Central Bank of Brazil to be eligible for remittances. The Central Bank establishes procedures related to the remittances and transfers of funds abroad. Foreign service suppliers wishing to supply a service as a juridical person must be organized as a legal entity foreseen by the Brazilian law, subject to the dispositions of the Brazilian Civil Code ('Código Civil'). Brazilian law establishes for juridical persons a separate existence from the person of its holders, thus granting the juridical person with individual existence. Consequently, a juridical person has full title and responsibility for their patrimonial rights and obligations. An entity earns the condition of private law juridical person when the corresponding incorporation act (By-Laws and/or Articles of Association) is duly filed with the appropriate Entities Public Registry (EPR). It is mandatory that the EPR records contain the following data on the juridical person: i) its denomination, purpose and location of head offices; ii) the description of its management,

²⁸ The EU Commission in particular has to accept that the accusation of total intransparency is well founded. In October 2004 MERCOSUR published their own offers on the web, an act which was immediately interpreted as a breach of the negotiation rules.

²⁹ Services - Brazil's initial offer March 30, 2004.

including active and passive, judicial and extra-judicial representation; iii) the process of amendment of the management provisions; iv) the provisions regarding the liability of the officers for its acts; and v) the provisions concerning its termination, including the destination of its assets. Juridical persons referred to as 'sole proprietorship' and 'partnership' are not considered as such under Brazilian law. A joint venture may be accomplished by a capital association through the formation of any type of business organisation as set forth in the Brazilian law (usually a Private Limited Liability Company - 'Limitada' - or a Corporation - 'Sociedade Anônima'). A joint venture may also be carried out through a 'consórcio', which is neither a juridical person nor a form of capital association. A 'consórcio' is used mainly with major contracts for rendering of services. It is a contract between two or more enterprises for a joint accomplishment of one specific undertaking. Each associate in a 'consórcio' maintains its respective organisational structure. Unbound for subsidies.

Mode 4) Presence of Natural Persons: Unbound³⁰

At the meeting of the 'XIII MERCOSUR - EUROPEAN UNION Biregional Negotiations Committee' in early May 2004, the European Commission, represented by DG Trade, reacted to this 'Services - Brazil's Initial Offer March 30, 2004' by strongly insisting that Brazil had to make more comprehensive concessions with regards to market access (MA) and national treatment (NT), above all in the first three of the four services sectors ('modes'), in analogy to GATS.

Accordingly, on 22 April 2004 the EU asked for a fundamental adjustment in *mode 1* ('cross-border supply') and *mode 2* ('consumption abroad') by the Brazilian delegation³¹: the EU negotiators stated with regret that Brazil had horizontally excluded ('unbound') these sectors in its market access offer for services of 30 March 2004. The Commission declared in April 2004:

'The coverage of mode 1 is very limited for this important mode of supply, in particular for Brazil (no commitments) and for Paraguay. It is essential to extend the coverage of mode 1, in particular with regard to: computer-related services; other business services; telecommunications; financial services.'³²

The sector relevant for investments (mode 3: 'commercial presence') is evident in 'Brazil's initial offer, March 30' on services: maintaining obligatory registration, capital transfer via the Central Bank of Brazil, and, among other conditions, recognising the validity of Brazilian

³⁰ Mercosur - European Union - Services. Brazil's Initial Offer, March 30, 2004, p.4; on the legal status of the terms 'none' and 'unbound' see: 'Where there are no limitations on market access or national treatment in a given sector and mode of supply, the entry reads NONE. [...When] a Member wishes to remain free in a given sector and mode of supply to introduce or maintain measures inconsistent with market access or national treatment, the Member has entered in the appropriate space the term UNBOUND.' For a guide to reading the GATS schedules of specific commitments and the list of article II (MFN) exemptions, see: <http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm>.

³¹ Minimum requirements for Mercosur offer on Services, 22 April 2004, p.1.

³² Minimum requirements for Mercosur offer on Services, 22 April 2004, p.1.

legislation, which future provisions in the EU-MERCOSUR-treaty should not undermine. Yet the EU Commission was not satisfied at all with the offer made by Brazil. Up until the present day, Brazil in particular has constantly received separate requests from the EU Commission in the EU-MERCOSUR negotiations. The following is an example from the sector 'financial services':

'Brazil: There are minor improvements for Brazil compared to GATS which do not even include the outcome of the 1998 GATS further negotiations. With regard to insurance, two elements must be included in the offer: a) commit with regard to the whole Maritime and Transport (MAT) on mode 1 and 2; 2) commit on re-insurance and retrocession on mode 1, 2 and 3. With regard to banking, the possibility to authorise the establishment of foreign banks on a case by case basis voids commitments of much of their value and legal certainty, and must be eliminated.'³³

The EU negotiations saw too many 'restrictions' in mode 3 ('commercial presence') of Brazil's offer for the service sector of late March 2004³⁴, especially from Brazil. The EU does not perceive that these 'restrictions' are very limited in Brazil anyway - no more than the last (post-crisis) 'sheet anchor'. At the centre of the EU critique is the Brazilian reservation, according to which cross-border capital transfer regulations are the competence of its Central Bank, so as to be able to take appropriate measures against an abrupt capital exodus when a crisis threatens the country, as happened in Argentina in late 2001. Nor does the still quite realistic crisis scenario of balance-of-payment risks in a region already weighed down by debt service and interest repayment stop the EU from demanding complete deregulation. The EU Commission remains silent on the remaining space for political action that MERCOSUR governments would still have in a crisis.

The EU Commission was also extremely irritated by the restricted offer the four MERCOSUR member states made for the 'environmental services' sector in April 2004:

'Environmental services. The improved offer only includes some limited commitments by Uruguay. There should be comprehensive commitments by all Mercosur countries in all modes of supply.'³⁵

In addition to sewage, waste disposal, sanitary installations and plants, 'environmental services' also include the highly sensitive area of 'drinking water', for which the EU wants a cross-border liberalisation, somewhat to the benefit of internationally operating European water companies. Coupled with comprehensive regulations for investments (in which the 'law certainty for investors' acts as exploitation logic implemented through an international treaty), the human right to water as an essential element of life would become completely subject to market logic. Price limits on water imposed by the state in the wake of an acute financial crisis, as for instance in Argentina in 2001, would be forbidden under an international treaty if the EU Commission imposes its demands in the negotiations: liberalised market

³³ Minimum requirements for Mercosur offer on Services, 22 April 2004, p.1.

³⁴ See Chapter 2 of this paper.

³⁵ Minimum requirements for Mercosur offer on Services, 22 April 2004, p.1.

access; the principle of national treatment of foreign investors; the elimination of the scope states have to create their own foreign direct investment policies; the inevitable regulations on liberalising profit transfers; etc.

The negotiation documents exchanged at the end of 2004 treated the sensitive area of water only with respect to sewage³⁶, which at first sight seemed a victory due above all to the persistent efforts of non-governmental organisations, which had been accusing the EU Commission of demanding the unilateral liberalisation of the developing countries' drinking-water supply in the WTO/GATS negotiations. However, a second look reveals a different picture. The Europeans do not demand the liberalisation of water in the chapter on services in the EU-MERCOSUR negotiations; they disguised it rather cleverly in the chapter on investments. And there the concepts regarding the areas of electricity, gas and precisely water supply, too, which the EU negotiators directly dictated into the negotiation document³⁷, read *in unison* as follows: 'RESERVATION TO BE CLARIFIED AND BETTER DEFINED':

E ELECTRICITY, GAS AND WATER SUPPLY	Limitations on market access	Limitations on national treatment
<p>40 Electricity, gas, steam and hot water supply</p> <p>4020 - Manufacture of gas except petroleum gases and derivatives</p> <p>4030 – Production of steam and hot water</p>	<p>None, except A, B</p> <p>A: Unbound (RESERVATION TO BE CLARIFIED AND BETTER DEFINED)</p> <p>B: Unbound (RESERVATION TO BE CLARIFIED AND BETTER DEFINED)</p>	<p>None, except A, B</p> <p>A: Unbound (RESERVATION TO BE CLARIFIED AND BETTER DEFINED)</p> <p>B: Unbound (RESERVATION TO BE CLARIFIED AND BETTER DEFINED)</p>
<p>41 Collection, purification and distribution of water</p>	<p>None, except A, B</p> <p>A: Unbound (RESERVATION TO BE CLARIFIED AND BETTER DEFINED)</p> <p>B: Unbound (RESERVATION TO BE CLARIFIED AND BETTER DEFINED)</p>	<p>None, except A, B</p> <p>A: Unbound (RESERVATION TO BE CLARIFIED AND BETTER DEFINED)</p> <p>B: Unbound (RESERVATION TO BE CLARIFIED AND BETTER DEFINED)³⁸</p>

³⁶ MERCOSURL offer – Services, date unclear.

³⁷ MERCOSUR-Improved Investment Offer – Sector-Specific Commitments, June 2004.

³⁸ MERCOSUR-Improved Investment Offer – Sector-Specific Commitments, June 2004

Until now, regarding government procurements, the Commission has not ceased to request 'transparency' and 'market access' regarding public calls-for-tender in the four MERCOSUR countries. The Brazilian negotiators in particular have refused to submit an offer that would exceed 'transparency'. Now transparency in the sense of the EU Commission does not mean 'democratic control of public spending', but transparency in all calls-for-tender, so as to secure new, profitable markets in the interest of European corporations. In May 2004, the EU Commission requested:

'The EC indicated which sectors are considered of key interest in an eventual future Mercosur offer. These are procurement by entities operating in the water, transport and energy sectors, indistinctively of their position at central or subcentral level. In general terms, contracts (including public works concessions) related to infrastructure are a priority for the EC.'³⁹

Indeed, the EU repeatedly declared (even word-for-word, as in the GATS-2000 Requests directed at 72 states), that it was not 'seeking the dismantling of public policies or the privatisation of state-owned companies'.⁴⁰

However, the pressure for privatisation is a priority in the austerity programmes of the International Monetary Fund and the World Bank, on the one hand; and on the other hand, the above-mentioned appeal to liberalise public procurement just demands consent to an internationally binding legal construction under which public expenditure exceeding a certain sum has to be internationally published, in accordance with 'non-discriminatory rules'. Admittedly, according to the latest negotiation proposals of 2004, bidders from MERCOSUR enjoy a certain preference in the planned free trade agreement between the EU and MERCOSUR. Nevertheless, it remains quite questionable as to how such an obligation to invite for tender all internationally operating suppliers could *not* promote precisely 'the dismantling of public policies or the privatisation of state-owned companies', and, *at the same time*, enable states to continue their autonomous policies of promoting and preferring their regional and local economies vis-à-vis foreign (in the case of the desired agreement: European) competitors?

In the 'investments' sector, the EU once again highlighted, in its 'Investment-Request'⁴¹ to MERCOSUR of 22 April 2004, that it did not intend any 'dismantling of public policies' or 'privatisation of state-owned companies'⁴², though nonetheless, it emphasised its interests:

'The EC proposes that Mercosur's initial investment commitments are revised in accordance with this request. The EC is both seeking improved commitments and

³⁹ Thirteenth Meeting of the MERCOSUR - EUROPEAN UNION Biregional Negotiations Committee, 3 - 7 May 2004, Brussels - Belgium, Final Conclusions, unabridged version

⁴⁰ Investment. Request from the EC and its Member States (hereinafter the EC) to MERCOSUR, 22 April 2004.

⁴¹ Investment. Request from the EC and its Member States (hereinafter the EC) to MERCOSUR, 22 April 2004.

⁴² Investment. Request from the EC and its Member States (hereinafter the EC) to MERCOSUR, 22 April 2004, p.1.

clarification of existing commitments as set out in this Request. The EC is furthermore looking for a reduction in scheduled limitations whether these are horizontal or sector specific in nature'.⁴³

It then highlighted in the access requests in the specific sectors:

'Specific Sectors

[...]

Brazil

Fishing, mining, manufacturing of motor vehicles, electricity, gas and water production are completely unbound.

EC request: to take commitments in these sectors. These are key sectors of interest to European investors.⁴⁴

It would be difficult to express the EU negotiations' goal with respect to the valorisation of central economic sectors in the interest of European capital more unambiguously than with '*these are key sectors of interest to European investors*'.

The BNC met again in May 2004, and in the 'General Conditions for Mercosur's Offer', MERCOSUR declared its support for a strict positive list for specific offers in the investment sector.

'When no reference is made to one or more MERCOSUR countries for a specific sector or sub-sector, it should be interpreted that that country or countries are not taking any commitments for that specific sector or sub-sector.'⁴⁵

Contrary to this, the EU negotiations insisted on eliminating the whole paragraph⁴⁶, which would in consequence mean the variant *negative list*.⁴⁷

The MERCOSUR negotiation offer in the 'investment' sector went on to explain:

'Taking into consideration the established principles of the applicable multilateral agreements, the disciplines of the Investment Chapter shall not be interpreted or

⁴³ Investment. Request from the EC and its Member States (hereinafter the EC) to MERCOSUR, 22 April 2004, p.1.

⁴⁴ Investment. Request from the EC and its Member States (hereinafter the EC) to MERCOSUR, 22 April 2004, p.2.

⁴⁵ 'The offer of the MERCOSUR countries is presented on a positive list approach, in accordance with what is stated in the methods and modalities document approved at the IXth Meeting of the Biregional Negotiations Committee (CNB).' in: *Biregional Negotiations Committee MERCOSUR - EUROPEAN UNION: Investment - improved MERCOSUR offer*, 21 May 2004, p.1.

⁴⁶ *MERCOSUR - EUROPEAN UNION: Investment - improved MERCOSUR offer*, 21 May 2004, p.1

⁴⁷ On the structure, function and risks of a negative list in contrast to those of a positive list, see: Russau, Christian: 'Durchsetzung internationaler Handelsregime zwischen der Europäischen Union (EU) und dem Gemeinsamen Markt des Südens (MERCOSUR)? Ausländische Direktinvestitionen als Gegenstand der Freihandelsverhandlungen im Spannungsfeld von Investorenrechten, Entwicklung und Menschenrechten', in: *FDCL: EU-MERCOSUR Bulletin N°1*, January 2004, p.61.

used as a limitation to the prerogatives of domestic regulation and of the adoption of new regulations in order to attain national policy goals.

Tax legislation and any measures relating to taxes shall not fall within the scope of the regulations contained in the Investment Chapter.¹⁴⁸

Again, the EU insisted on the elimination of a whole paragraph, this time with respect to a tax-exemption regulation.⁴⁹ The EU also wanted to eliminate the restrictions on investment provisions at federal level, submitted by Argentina and Brazil⁵⁰, and the EU Commission manifested its extreme disappointment after the exchange of the 'improved offers' of May 21/22⁵¹, since the MERCOSUR offer in the investment and trade-related policy-making sector still only related to the federal level. The Commission had already deplored this in April:

'It is also understood that for the EC it is an important condition that the sub-federal level of government and tax measures are not excluded from the provisions of the agreement and from each Party's schedule of investment commitments.'⁵²

The negotiation poker intensified in June 2004: on the MERCOSUR side, the sensitive investment sector, together with services and public procurement, crystallised as the most difficult negotiation topic; on the EU side, it was the agricultural sector. The complete document 'MERCOSUR - Improved Investment Offer – Horizontal Commitments'⁵³ of June 2004 lists a number of limitations by the four MERCOSUR member states with respect to market access and national treatment, which - according to comments by the EU negotiators - have to be *eliminated without replacement*:

- the *condition of the possibility* to take autonomous measures with respect to horizontal market access and national treatment, as well as the introduction of specific investment regimes (above all in Brazil),
- the *condition of the possibility* of performance requirements⁵⁴ (Paraguay),
- restrictions on land purchase (Argentina, Paraguay, Brazil),

⁴⁸ *Investment. Request from the EC and its Member States (hereinafter the EC) to MERCOSUR*, 22 April 2004, p.2.

⁴⁹ *Investment. Request from the EC and its Member States (hereinafter the EC) to MERCOSUR*, 22 April 2004, p.2.

⁵⁰ 'Argentina and Brazil, as Federal Republics, and in accordance with their Constitutions, restrict their commitment only to measures corresponding to the federal level of government.' – EU note: 'Eliminate'.

⁵¹ 'Proposta do Mercosul não agrada à UE', in: *Folha de São Paulo*, 25 May 2004.

⁵² *Investment. Request from the EC and its Member States (hereinafter the EC) to MERCOSUR*, 22 April 2004, p.2

⁵³ *MERCOSUR-improved investment offer – Horizontal commitments*, June 2004.

⁵⁴ 'Performance Requirements: P: reserves the right to maintain or adopt any measure related to performance requirements in regulations and/or programmes for domestic producers of capital and information technology goods', in: *MERCOSUR-improved investment offer – Horizontal commitments*, June 2004, p.1.

- reserving the capacity to control privatised stock companies and special share arrangements, such as 'golden shares' (Argentina),
- the *condition of the possibility* for subsequent law modifications in the interest of consumer and environmental protection (Uruguay),
- national programmes for domestic producers of any goods⁵⁵ (Paraguay),
- the capacity to adopt statistical-control measures with respect to foreign direct investments (Uruguay),
- domestic quota regarding acquisitions by foreign investors (Uruguay, Brazil),
- minimum domestic quota regarding staff and directors in accordance with Brazilian legislation (Brazil),
- requirements and measures regarding technology transfer (Uruguay, Brazil),
- the right to fiscal incentives and other measures and requirements in the interest of national industrial and development policies⁵⁶ (Brazil),
- requirements on technology transfer as an inherent element of the contractual clauses concerning the intellectual property rights (Brazil),
- and general demands for autonomous national development policies with the capacity to explicitly exclude the national treatment of foreign investors (Brazil),⁵⁷
- as well as the explicit preferential treatment of small and medium domestic companies according to Brazilian law⁵⁸.

To ensure comprehensive protection of their regulation sovereignty on the one hand,⁵⁹ as well as for the contractual recognition of the existing asymmetries between MERCOSUR and the EU on the other hand, Brazil, above all, but increasingly Argentina, too⁶⁰, is demanding measures and regulations in the industrial policy sector that would also affect foreign direct investments, which it did in the 'side-by-side' text 'investments' of the meeting of May 3-7, 2004:

⁵⁵ '[P]rogrammes for domestic producers of any goods', MERCOSUR-improved investment offer – Horizontal commitments, June 2004.

⁵⁶ 'Brazil reserves the right to maintain or adopt any measure pertaining to subsidies, incentives, grants, or differentiated financial terms, including subsidized loans, guarantees and insurance by government institutions', in: *MERCOSUR-improved investment offer – Horizontal commitments*, June 2004.

⁵⁷ '[R]eserves the right to adopt or maintain any measure that, although denied to foreign investors and their investments, is aimed at developing less privileged regions or at reducing regional inequalities', *MERCOSUR-improved investment offer – Horizontal commitments*, June 2004.

⁵⁸ Brazil 'reserves the right to adopt or maintain any measure aimed at according favored treatment to small enterprises incorporated under Brazilian laws that have their headquarters and management in Brazil', *MERCOSUR-improved investment offer – Horizontal commitments*, June 2004.

⁵⁹ 'Reserves the right to maintain or adopt any measure related to performance requirements in regulations and/or programmes for domestic producers of capital and information technology goods', *MERCOSUR-improved investment offer - sector-specific commitments*, June 2004.

⁶⁰ See: *Valor Económico*, 30 August 2005.

'[R]ecognizing the asymmetries existing with respect to the degree of development of regulations.

[...]

This Chapter does not apply to policies of incentives for technological and industrial development, or to social and environmental policies, at the central, regional or local level⁶¹,

This stands in contrast to the EU, which at the time preferred to leave a blank space at the same paragraph in its text proposal.⁶²

In the 'side-by-side' text 'services' of the meeting of May 3-7, 2004, MERCOSUR had pre-defined:

'This provision shall not restrict the right of parties to regulate and to introduce new regulations in order to meet national policy objectives⁶³,

whereas the EU side wished at most to express its 'good faith' 'in order not to undermine the conditions of each Party`s service suppliers'.⁶⁴

The EU and MERCOSUR negotiation delegations met in September 2004 in an attempt to meet the negotiation deadline (on October 31, 2004 due to the EU Commission change). In section II ('Sector Specific Commitments')⁶⁵ of its investment sector offer ⁶⁶ MERCOSUR liberated several investment sectors like 'mining', 'agriculture' and 'manufacturing'⁶⁷, which had not been comprehensively liberated before: completely in some sub-sectors ('none'), or with limitations in others. However, in section I ('General Conditions'), MERCOSUR redefined as an indispensable condition the possibility for active industrial policy-making:

⁶¹ XIII BNC/MS-EU/TG-2/33/06.05.04 EU-MERCOSUL 13th round of negotiations, 3-7 May 2004, Investment/establishment chapter (side-by-side text).

⁶² XIII BNC/MS-EU/TG-2/33/06.05.04 EU-MERCOSUL 13th round of negotiations, 3-7 May 2004, Investment/establishment chapter (side-by-side text), p.1.

⁶³ XIII BNC/MS-EU/TG-2/32/07.05.04 EU-MERCOSUL NEGOTIATIONS, TG 2 – Services consolidated text, p.1.

⁶⁴ XIII BNC/MS-EU/TG-2/32/07.05.04 EU-MERCOSUL NEGOTIATIONS, TG 2 – Services consolidated text, p.1.

⁶⁵ All offers, including 'public procurement', 'services' and 'goods' (with the comprehensive lists of goods) are on the public website of the Brazilian Foreign Ministry, *Itamaraty*): *Mercosur-European Union - Mercosur's Completed Offer on Investment, 24 September 2004*, pp.13.

⁶⁶ *Mercosur-European Union, Mercosur's Completed Offer on Investment, 24 September 2004*, see: Section 1, General Conditions.

⁶⁷ Argentina, for instance, reserved the right 'to maintain or adopt any measure related to performance requirements in regulations and/or programmes for domestic producers of capital and information technology goods', and 'to maintain or adopt any measure related to incentives in regulations and/or programmes for domestic producers of capital and information technology goods' in the sector 'Manufacturing', in: *Mercosur-European Union, Mercosur's Completed Offer on Investment, 24 September 2004*, p.13.

'This offer is based on the assumption that the flexibilities determined by national laws and regulations are recognized. Thus it shall not be interpreted as a limitation to domestic regulation or to the introduction of new regulations with a view to achieving national policy objectives, in accordance with the main objectives of this agreement.

This offer is also based on the assumption that the Mercosur-EU agreement shall not interfere with existing bilateral agreements relating to taxes and tax measures or with the capacity of Mercosur countries to pursue the objectives of their fiscal policies.⁶⁸

Shortly before the EU delegation mandate expired on November 1, 2004, the negotiations failed - at least provisionally.

During their meeting in September 2005, the MERCOSUR and EU delegations agreed on a new schedule for two BNC working meetings for late 2005 and early 2006. They also agreed on a ministerial conference in early 2005 in preparation for the summit of Heads of State and Government from Latin America, the Caribbean and Europe in May 2006 in Vienna. After their early September meeting, the parties leaked the information that an agreement had almost been reached in the investment and public procurement sectors, which had until then been quite controversial, whereas services and agriculture still required considerable discussion.⁶⁹ In addition to this, there are increasing signs that MERCOSUR might be granted special conditions which would allow its members to implement the reciprocal agreements with some delay - in the sense of a 'temporary special and differential treatment (S&D)⁷⁰, yet not a fundamentally different treatment, adapted to their respective developments.⁷¹

If this estimation of a 'comprehensive agreement' in the investment and public procurement sectors proves to be correct, the space MERCOSUR has for creative investment policy-making would come to an end very soon, and yet another irreversible step towards the regulation of deregulation would have been taken. This is rather in the interest of transnationally operating corporations, not least European ones.

4. BILATERAL INVESTMENT AGREEMENTS VERSUS DEVELOPMENT PROMOTING POLICY-MAKING

Free trade agreements provide transnational corporations with the legal framework for their global production networking, enabling them to benefit from production-network strategies that exclusively depend on the respective market situations, and restricting state regulations and interventions with a web of international treaties. Traditionally, until well into the 1990s,

⁶⁸ Mercosur-European Union - Mercosur's Completed Offer on Investment, 24 September 2004.

⁶⁹ 'Áreas como investimentos e compras governamentais (as chamadas concorrências públicas) já estariam com as discussões bastante avançadas',

BBC Brasil: see <http://www.bbc.co.uk/portuguese/reporterbbc/story/2005/09/050902_cimentifn.shtml>.

⁷⁰ BRIDGES, Weekly Trade News Digest, Vol. 9, Number 29, 7 September 2005.

⁷¹ This was matched by a statement made by Karl Falkenbergs, deputy director-general in the Directorate-General for Trade of the EU Commission, who wants to withdraw the development country status from Brazil (*Valor Econômico*, 28 September 2005).

European foreign investments in MERCOSUR were more interested in the respective domestic markets: European corporations focussed on the domestic markets of Argentina and Brazil⁷², but as a consequence of increasingly volatile markets, the transnational companies are increasingly shifting towards a position which is directed at the world market. The globally operating players are concentrating on export production for the world market, taking advantage of the 'comparative cost advantages', while the respective inter-connecting of corporation-controlled global production networks is proclaimed as a maxim.

The 'certainty of the law' that free trade and bilateral investment agreements grant transnational operating corporations for their foreign direct investments - and consequently the legal guarantee for the integration of as many production units as possible, including their suppliers, into the global production network of the transnational corporations - is ultimately secured by the installation of international 'dispute settlement bodies'. The dispute settlement mechanism in regional free trade agreements like the one planned between the EU and MERCOSUR is limited to the complaints that *states* can file against other *states*, whereas in the numerous existing bilateral investment agreements⁷³, like those between European and MERCOSUR states, *private investors* have the right to file complaints *against states*. Consequently, both types of international agreements in place for the 'investment' sector *secure in an alarmingly efficient way the deregulation of national markets by regulating international investment regimes according to neo-liberal market rules*.⁷⁴

In Latin America, international disputes in the investment sector are not only an intensely discussed issue in the wake of the Argentinian crisis of late 2001, they are a rapidly aggravating, yet widely ignored problem.⁷⁵ Argentina in particular, which signed and ratified more than fifty bilateral investment-agreements in the 1990s, had negative experiences with regard to international disputes filed against it at international tribunals on the basis of

⁷² 'Brazil and Argentina have long since been a focal point of FDI outside the OECD area by European companies. [...] Traditional FDI patterns were the result of European investors' preference for large and protected markets'. Notably in the automobile and chemical industries, the size and growth of markets provided the major stimulus to FDI in the Mercosur region. Multinational companies used FDI mainly to overcome import barriers', in: Nunnenkamp, Peter: 'Foreign Direct Investment in Mercosur: The Strategies of European Investors', in: Paolo Giordano, Chaire Mercosur de Sciences Po [ed.]: *An Integrated Approach to the European Union - Mercosur Association*, 2002, p.231; see also: Jost, Thomas / Nunnenkamp, Peter: 'Bestimmungsgründe deutscher Direktinvestitionen in Entwicklungs- und Reformländern - Hat sich wirklich etwas verändert?', *Kieler Arbeitspapier Nr.1124*, August 2002.

⁷³ See also Chapter 4 of this paper. Between 1991 and late 2004, 415 BITs were signed in Latin America and the Caribbean, see: *Folha de São Paulo*, 1 September 2005.

⁷⁴ On the polarity of regulation and deregulation, see: Russau, Christian, 'Durchsetzung internationaler Handelsregime zwischen der Europäischen Union (EU) und dem Gemeinsamen Markt des Südens (MERCOSUR)? Ausländische Direktinvestitionen als Gegenstand der Freihandelsverhandlungen im Spannungsfeld von Investorenrechten, Entwicklung und Menschenrechten', in: *FDCL: EU-MERCOSUR Bulletin* Nr.1, January 2004, p. 86.

⁷⁵ See among others: Lagerberg, Gerry: 'Demand for International Arbitration is growing, according to PriceWaterhouseCoopers', 4 March 2004; 'Arbitration: Sign of the times', in: *Legal Week* 13 January 2005; Tawil, Guido Santiago: *Investor-State Arbitration : A hot issue in Latin America*, (Buenos Aires: M.& M.Bomchil, 2002).

bilateral investment treaties,⁷⁶ even if, out of thirty-six complaints filed by early 2005⁷⁷, four have meanwhile been withdrawn.⁷⁸ These pending indemnisation requests against Argentina are also one of the reasons why Argentina is currently engaged in a debate on a fundamental revision of the BITs, including at top governmental levels.⁷⁹ Paraguay, with sixteen already ratified bilateral investment treaties,⁸⁰ and Uruguay, with twenty-eight⁸¹, have not yet been accused on the basis of their bilateral investment treaties in front of international tribunals. Yet the experiences of Argentina have put at least Uruguay on alert, where since April 2005 the parliament has been engaged in a heated dispute on these BITs, especially regarding the issue of the BITs between Uruguay and the United States signed by the former government under President Batlle.⁸² In June 2005, the controversy on this BIT even extended to MERCOSUR, when an unnamed source in the Brazilian Ministry of Foreign Affairs, *Itamaraty*, predicted sanctions against Uruguay, on the grounds that these BITs were incompatible with MERCOSUR treaties.⁸³

Brazil for its part is a special case among the four MERCOSUR countries: it is one of the few states without a ratified bilateral investment-treaty (BIT). Although Brazil did sign fourteen BITs in the course of the 1990s (1994-1999),⁸⁴ none of them have yet been ratified, and so, at

⁷⁶ See also among others: Teitelbaum, Alejandro: *Las demandas de las sociedades transnacionales contra el Estado Argentino ante los tribunales arbitrales del CIADI (I)*, found in: <<http://www.argenpress.info/nota.asp?num=018574>>; see also: Bissio, Roberto: 'El arbitraje internacional no está por encima de la Constitución', dice el Ministro de Justicia, *Red Tercer Mundo*, 11 April 2005; also: Verbitsky, Horacio: 'Las batallas del tercer año', in: <<http://www.pagina12.com.ar>>, March 2005; see also: Peterson, Luke Eric, 'ICSID tribunal issues pair of jurisdictional decisions in financial crisis arbitrations', in: *INVEST-SD: Investment Law and Policy News Bulletin*, 10 June 2005, and: Peterson, Luke Eric, 'Argentine Bondholders girding for multi-billion dollar investment treaty claim', in: *INVEST-SD: Investment Law and Policy News Bulletin*, 10 June 2005.

⁷⁷ Peterson, Luke Eric: 'The Global Governance of Foreign Direct Investment: Madly Off in All Directions', in: Friedrich Ebert Stiftung: *Dialogue on Globalization. Occasional Papers*, Geneva, N° 19, May 2005, p.13.

⁷⁸ See AFP, 20 July 2005; Peterson, Luke Eric, 'First domino falls on Argentina as tribunal rules in financial crisis arbitration', in: *INVEST-SD: Investment Law and Policy News Bulletin*, 27 May 2005.

⁷⁹ See: *La Nación*, 12 September 2005.

⁸⁰ UNCTAD database, <<http://www.unctadxi.org/templates/DocSearch.aspx?id=779>>

⁸¹ UNCTAD database, <<http://www.unctadxi.org/templates/DocSearch.aspx?id=779>>, a number of signed but as yet unratified BITs have to be added, see: <<http://www.mrree.gub.uy/Tratados/MenuInicial/busqueda/Tema/Tema2.htm>>

⁸² See among others: Sánchez, Hilda / Orsatti, Alvaro: *Los Tratados de Inversión: hechos y políticas en el Cono Sur*, August 2005; Vis-Dunbar, Damon: 'Uruguayan Senate debates US BIT, looks for common Mercosur posture on BITs', in: *INVEST-SD: Investment Law and Policy News Bulletin*, 22 August 2005; also: *Observador*, 21 September 2005.

⁸³ '[...] provocar sanciones contra Uruguay, por ejemplo, su exclusión del Mercosur por ser el Tratado incompatible', in: *La República*: 'El tratado uruguayo con EEUU preocupa en Argentina y Brasil', 12 June 2005.

⁸⁴ On the content, structure, system conformity and risks of the Brazilian BITs see extensively: Russau, Christian: 'Durchsetzung internationaler Handelsregime zwischen der Europäischen Union (EU) und dem Gemeinsamen Markt des Südens (MERCOSUR)? Ausländische Direktinvestitionen als Gegenstand der

present, Brazil still has the autonomy to decide on its investment and industrial policies without restrictions from legally binding international treaties. Six of the fourteen signed but unratified BITs have been transferred to the Brazilian lower house of parliament, the *Câmara dos Deputados*, by the government of Fernando Henrique Cardoso (FHC). According to Art. 49 of the Brazilian Constitution⁸⁵ the ratification of all international treaties devolves upon the Brazilian parliament - first the *Câmara dos Deputados*, then the Senate - before the President declares their final ratification.

Between 2000 and 2002, in the course of attempts to ratify the BITs signed between 1994 and 1999 by the Brazilian government, the *Câmara dos Deputados* saw an intense debate in which the opposition insisted on two fundamental arguments against the treaties. In addition to the various constitutional conflicts that would arise from these treaties after their ratification⁸⁶, the opposition criticised the latter inherent regulations on international jurisdiction in disputes on foreign direct investments⁸⁷: firstly, the better treatment for foreign investors, since national investors have no access to international courts⁸⁸, and secondly, the fact that the 'investor-to-state' complaint right inherent to BITs clashes with the first constitutional principle of Brazil.⁸⁹

As a result, none of these BITs were ratified by the *Câmara*, which was due mostly to the continuing refusal of the oppositional *Partido dos Trabalhadores* (PT), so in the course of 2002, long after the Special Parliamentary Report had been compiled⁹⁰, the Brazilian President FHC withdrew the BITs ratification process (under the lamentations of the then Secretary of For-

Freihandelsverhandlungen im Spannungsfeld von Investorenrechten, Entwicklung und Menschenrechten', *FDCL: EU-MERCOSUR Bulletin N°1*, January 2004, pp. 69.

⁸⁵ 'Art. 49. É da competência exclusiva do Congresso Nacional: I - resolver definitivamente sobre tratados, acordos ou atos internacionais [...]', Constitution of the Federal Republic of Brazil 1988.

⁸⁶ See extensively: Bithiah de Azevedo, Déborah: *Os acordos para a promoção e a proteção recíproca de investimentos assinados pelo Brasil*, Consultoria Legislativa, Câmara dos Deputados, May 2001.

⁸⁷ See extensively: *Diário da Câmara dos Deputados* from 13 April 2000, reprinted in: *Diário da Câmara dos Deputados*, August 2003, pp.37782-37809.

⁸⁸ See also: Russau; Christian: 'Durchsetzung internationaler Handelsregime zwischen der Europäischen Union (EU) und dem Gemeinsamen Markt des Südens (MERCOSUR)? Ausländische Direktinvestitionen als Gegenstand der Freihandelsverhandlungen im Spannungsfeld von Investorenrechten, Entwicklung und Menschenrechten', *FDCL: EU-MERCOSUR Bulletin N°1*, January 2004, p.80.

⁸⁹ Thus, the MP José Dirceu warned in the *Câmara dos Deputados*: '[...] necessário considerar que o recurso á arbitragem internacional, na forma proposta pelo Acordo Brasil/Alemanha e pelos demais APPI, fere, a nosso ver, o inciso I do artigo 1º da Constituição Federal, o qual afirma a soberania como um dos fundamentos da República Federativa do Brasil'. *Diário da Câmara dos Deputados* 13 April 2000, reprinted in: *Diário da Câmara dos Deputados*, August 2003, p.37804; see also: 'Art. 1º A República Federativa do Brasil, formada pela união indissolúvel dos Estados e Municípios e do Distrito Federal, constitui-se em Estado Democrático de Direito e tem como fundamentos: I - a soberania; [...]', in: Art. 1 Constitution of the Federal Republic of Brazil 1988.

⁹⁰ The differing opinions of the members of the *Relatório de Grupo de Trabalho* were only published in August 2003 in the *Diário da Câmara dos Deputados*, see *Diário da Câmara dos Deputados* from 13 April 2000, reprinted in: *Diário da Câmara dos Deputados*, August 2003, pp.37782-37809.

eign Affairs)⁹¹ from the *Câmara dos Deputados*.⁹²

Partly in response to these experiences, several competing drafts aimed at changing the ratification modalities of international treaties were presented in both houses of the Brazilian Congress (House of Representatives and Senate) in the course of 2004: drafts that aim to restrict the participation margin and ratification modalities of the Brazilian Congress, as well as drafts that aim to widen these capacities.⁹³ The corresponding parliamentary debates are still in progress.

After the departing government of *FHC* had declared the formal withdrawal of the ratification process from the *Câmara dos Deputados* in late 2002, the political decision-making competence on the modalities of the further proceedings relating to the *BITs* (ratification, modification or refusal) was transferred to the Foreign Trade Chamber (*Câmara de Comércio Exterior, Camex*⁹⁴). For the spring of 2005, the *Camex* commissioned an internal (still unpublished) report from an inter-ministerial committee which gave advice on the declaration of the further proceedings relating to the Brazilian *BITs*.⁹⁵ The still unpublished decision⁹⁶ is important insofar as with it, Brazil finds itself at the crossroads between *subordination under the neoliberal investment regulatory concept through internationally binding treaties and the fundamental right to make autonomous decisions and implement creative investment policies on its own territory*.⁹⁷

⁹¹ 'Embora o Governo tenha oferecido argumentos para dirimir dúvidas e esclarecer questões levantadas no Congresso, é forçoso constatar que os acordos, por um lado, nunca encontrou o respaldo político necessário para sua aprovação e, por outro, deixaram de refletir as tendências que hoje prevalecem no cenário internacional. É essa a conclusão a que chegamos, meus colegas da Fazenda, do Ministério do Desenvolvimento, Indústria e Comércio Exterior e eu próprio, juntamente com o Presidente do Banco Central, após examinarmos Relatório de Grupo de Trabalho que estabelecemos para debater a matéria. No caso do Acordo firmado com a República Federal da Alemanha, como nos demais, impõe-se nessas condições, a decisão de retirar a Mensagem. Que ora submeto a Vossa Excelência.' Celso Lafer, Records of the 234th Morning Session S 12 December 2002, p.54410.

⁹² Ibid pp.54410-54415.

⁹³ See: Agência Câmara dos Deputados: 'Deputados querem participar mais de acordos internacionais' consolidated - 19/5/2005 0h15; see also the decision of the *Comissão de Constituição e Justiça e de Cidadania* from 9 December 2004, in: Agência Câmara dos Deputados - Event - 9/12/2004 16h15; see also draft legislation PL 4291/04, on conferring more participative powers to the Câmara de Deputados in international agreements, in: Agência Câmara dos Deputados - Order - 4/11/2004 9h20; see also: Agência Câmara dos Deputados - consolidated - 20/9/2004 20h01.

⁹⁴ 'A Câmara de Comércio Exterior - Camex, órgão integrante do Conselho de Governo, tem por objetivo a formulação, adoção, implementação e a coordenação de políticas e atividades relativas ao comércio exterior de bens e serviços, incluindo o turismo', found in: <<http://www.desenvolvimento.gov.br/sitio/camex/camex/competencia.php> On the importance of Camex and various reform proposals see: Ex-embaixador defende maior poder da Camex, in: *Gazeta Mercantil*, 18 August 2005.

⁹⁵ See also: 'Camex define destino de acordos bilaterais', in: *Valor Econômico* 18 April 2005, and *Valor Econômico* 9 May 2005.

⁹⁶ State mid-August 2005.

5. Conclusions

It is the principal goal of neo-liberal policies to eliminate the *condition of the possibility* for trade-relevant policies, which for instance use active governance elements to promote local or regional development, or capital-flow controls, or other restrictions and conditionings in an acute financial crisis, as a form of political control. The legal foundation of this elimination is provided by bilateral investment treaties on the one hand, and free trade agreements, such as the one currently being negotiated between the EU and MERCOSUR on the other hand. A victory for the EU negotiators in the meanwhile resumed negotiations on an 'inter-regional association treaty' between the EU and MERCOSUR, i.e. the legally binding adoption of the eliminations the EU so vehemently requested in the past, would result in, amongst other effects,⁹⁸ one of the two key elements to end the *condition of the possibility of autonomous industrial policies* which the four MERCOSUR countries have to promote region- or sector-specific development by means of economic policy-making. The second element in the web of international investment regime agreements consists of the bilateral investment 'protection' treaties. In the case of MERCOSUR, the position of Brazil concerning the decision on ratification, modification or refusal, or the pending BITs, is pivotal, but the Argentinian discussion on a retrospective modification of existing BITs is equally important. However, if internationally binding treaties eliminate the *condition of the possibility* for political decision-making in the sector of foreign direct investments on national territory, thus imposing the deregulation of domestic markets through the regulation of international investment-regimes⁹⁹, the question arises as to which possibilities states may still have to conduct active investment policies to promote social development, on the one hand; and on the other hand, there is a risk of losing democratic control in these political areas, where democratically elected governments cannot exercise any politically relevant influence, since they are restricted by international investment regimes. And this is one of the reasons to oppose not only the free trade agreement between the European Union and MERCOSUR, but also any bilateral investment agreements (existing, planned or in the ratification process).

⁹⁷ See also: Luke Eric Peterson, 'Brazilian government's decision on ratification of BITs looming', in: *INVEST-SD: Investment Law and Policy News Bulletin*, 27 April 2005.

⁹⁸ This paper deals exclusively with the questions of 'investments'. For the serious consequences of a potential 'inter-regional association treaty' between MERCOSUR and the EU, see: 'Alianza Social Continental: Movimientos de Mercosur: el acuerdo con UE es nocivo a los pueblos', 3 June 2004, see <http://www.asc-hsa.org/article.php3?id_article=148>; 'Alianza Social Continental: Acuerdo com UE traria 'ganho social zero'', 15 October 2004, see <http://www.asc-hsa.org/article.php3?id_article=190>; 'Declaración de los movimientos y organizaciones sociales del Mercosur: UE-Mercosur: ganancias para pocos, amenaza para la mayoría', 22 October 2004, see <http://www.bilaterals.org/article.php3?id_article=771>.

⁹⁹ See extensively: Russau, Christian, 'Durchsetzung internationaler Handelsregime zwischen der Europäischen Union (EU) und dem Gemeinsamen Markt des Südens (MERCOSUR)? Ausländische Direktinvestitionen als Gegenstand der Freihandelsverhandlungen im Spannungsfeld von Investorenrechten, Entwicklung und Menschenrechten', in: *FDCL: EU-MERCOSUR Bulletin N°1*, January 2004

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