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Is A Model EU Bit Possible-or Even Desirable?
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Perspectives on topical foreign direct investment issues by
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“Is a model EU BIT possible—or even desirable?”

by

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The Treaty on the Functioning of the European Union (TFEU), which entered into force on December 1, 2009, extends the Common Commercial Policy (CCP) articles 206 and 207 to embrace “foreign direct investment.” This raises the question of whether the EU is now in a position to adopt a model BIT articulating a common policy on foreign direct investment (FDI). An EU policy on FDI could replace the disparate efforts of the 27 member states, complementing and reinforcing their efforts and presenting a stronger image to the world, especially at a time when the EU appears to have lost ground to other jurisdictions as a preferred destination for FDI.[1]

Suggesting the preparation of an EU model BIT for treaty relations with third states assumes that the EU is empowered to do so and has the competence to negotiate and ultimately to implement any such agreement. However, despite the expansion of the CCP to include FDI, there remain many doubts as to the capacity of the EU to embark on such a course alone. The obstacles are at once political (the reluctance of member states to abandon their authority here) and legal (the limited competence under the CCP to regulate the internal market). In this context, three models can be envisaged: 1) a BIT binding all EU member states and concluded by the EU alone; 2) a BIT concluded as a mixed agreement (signed by both the EU and each member state); or 3) a BIT relating to

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[1] See José Guimón, “It’s time for an EU investment promotion agency,” *Columbia FDI Perspectives No. 20*, March 4, 2010.

EU action alone. Given the circumstances, the negotiation and implementation of a model BIT may only be possible as a mixed agreement with the willing concurrence of member states.

EU competence over the CCP is exclusive, which has led some to suggest that member states must cease to negotiate BITs now that TFEU articles 206 and 207 are in place.[2] However, it is by no means clear what the new CCP competence embraces. The CCP has been read by the ECJ to focus essentially outward, seemingly giving the EU authority to set the conditions for admission of foreign investment into the internal market, including the types of FDI and investors allowed and the conditions at the point of entry. But it is not clear that the CCP covers regulation of the standards of treatment of FDI in the internal market, as well as guarantees against performance requirements and expropriation. The TFEU does not define "foreign direct investment," and the definition seems to exclude portfolio investment. It is also uncertain that the EU could commit to all forms of investor state arbitration. Certainly it could not commit to ICSID procedures as it is not a state. A further complication, which it shares with several federal states, is that it may not be able to recover the damages that it might be condemned to pay on behalf of member states' peccadilloes.

Given these limitations, a unilateral EU BIT would not be the equivalent of the standard BITs between member states and third states: hardly an attractive negotiating position from which to start. Further questions remain: Would an EU BIT protect only against EU action or against the acts of all member states? If MFN and national treatment are offered, what will be the comparator – the EU or member states' action? Would the EU seek to renegotiate the hundreds of BITs with third states? If this were attempted, there are many pitfalls in renegotiating BITs, at least with those countries that are already actively seeking to get out of their existing BIT obligations. In this regard it should be noted that hundreds of "outdated" air transport bilateral agreements still remain in place due to inertia and the difficulties of renegotiation.

A related legal issue is posed by the 191 existing BITs between member states. Are they to disappear as did air transport bilateral agreements when EU competence over air transportation was exercised after 1989? So far, only the Czech Republic is willing to abandon its intra-EU BITs – perhaps because it has been an unsuccessful respondent in several investor-state claims?

One should note that there is already a partial model EU BIT: the *Minimum Platform for Investment for the EU FTAs.* This is a curious document prepared by the Directorate General for Trade in 2006,[3] focused primarily on establishment and trade in financial services providing investment services. It provides guidance to negotiators of EU trade agreements who may have a mandate to include provisions related to

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[2] Marc Bungenberg, "The politics of the European Union`s investment treaty making," in Tomer Broude and Amy Porges (eds.), *The politics of international economic law*, CUP 2010 (forthcoming), at 17, working paper available at: http://www.asil.org/files/ielconferencepapers/bungenberg.pdf; C. Tietje, 'Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon,' 83 *Beiträge zum Transnationalen Wirtschaftsrecht* (2009) at 19.

[3] Council of the EU, Brussels 6 March 2009, 7242/09, Limited; first issued as *Minimum platform on investment for EU FTAs – Provision on establishment in template for a Title on "Establishment, trade in services and e-commerce,"* Note to The 133 Committee, European Commission DG Trade, Brussels, 28 July 2006, D (2006) 9219. It must be noted that this document, although available on several NGO websites, has never been officially issued. Requests under freedom of information have been denied.

investment. It does not read like a standard BIT, and it would have to be considerably amended and expanded to serve as a genuine model BIT.

Surely a common legal standard regulating FDI in the EU is an eminently sensible goal: it would replace 27 competing jurisdictions with one high standard of protection; it would allow the EU to present a common face to the world on FDI issues; and it would serve as a powerful incentive to promoting global standards. But it would be foolish to minimize the obstacles that lie in the path of this laudable goal.

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