David Müller: **European Model BIT – What Do We Need It For?**

Considering the transfer of competences of the European Union under the Lisbon Treaty, the Union must, reflecting its new powers in the field of external trade, newly design its framework for investment policy. When the Lisbon Treaty amending the Treaty on European Union and the Treaty establishing the European Community came into force, foreign direct investment has been included in the Common Commercial Policy and within the sphere of the Union's exclusive competence. Nevertheless, no further specific provisions concerning the limits and definitions are provided in the Treaties. This is the cause of countless questions regarding the execution of these recently gained powers.

Prior to the search for the future European investment policy, we have to realize what is currently at disposal for promotion and protection of investment. Previous efforts to develop an ambitious investment policy came to an end with the creation of the *Minimum platform on investment for EU FTAs* which was adopted by Member States in November 2006 and supposed to serve as basic model for investment chapter in FTAs. So far, regulation of investment in the EU has been fragmented and fractional, resulting from the division of powers. Up to this point, Minimum platform provisions covered pre-establishment phase, but under Lisbon Treaty, the Article 207 of the Treaty on the Functioning of the European Union authorizes EU to exclusively conclude agreements encompassing post-establishments phase as well. Besides mentioned Minimum platform, we have the vast network of almost fifteen hundreds of existing agreements concluded by individual Member States.

Analyzing any prospective European Model BIT, it is absolutely necessary and crucial to ask for the purpose of this model, for its potential benefits and costs. To be precise, the question is not, whether we can adopt some kind of model European provisions. We surely can, if we need it – it is entirely in the EU's power to create such a template. However, the issue of paramount importance is what we need it for and how it may be used. Basically, the purpose of a model agreement is determined by the added value it may provide to current regulations and agreements. Naturally, any template would be obsolete without real application and implementation justifying its existence.

Generally, for the sake of the protection of investors, there are several options to be discussed. Present BITs of Member States shall remain valid ensuring the legal certainty, without setting specific and definitive time limits. These may be complemented or even replaced with investment chapters in FTAs or separate BITs. Further, both of these may be based on a template or negotiated ad hoc for every specific third country/partner. In doing so, components of these provisions would supposedly be more or less the same in their content.

The link between trade and investment clearly appears to be closer and tighter and foreign investment is crucial for the EU competitiveness. Identical investor treatment and regulation granted in all EU Member States should help to further encourage foreign investment. Therefore, the European investment policy is to be established with certainty, nevertheless its coverage is so far unclear. Presumably, the model agreement shall lay foundations for a more ambitious policy.

Reasons in favour of the EU Model BIT can easily be highlighted. It would establish a corner stone providing investors in and from the European Union with a broad and complex investment agreement, with assured market access for the pre-establishment phase and efficient protection of investment in the post-establishment phase. In addition, the model would constitute predictable, transparent and all-round basic document for the EU’s negotiators. It would ensure an equivalent position of partners and allow stakeholders to express their concerns deeply and transparently. Besides that, it would reduce distortion caused by heterogeneity of partners and their bargaining powers. Indeed, it has not potential to completely eliminate the uncertainty of individual and ad hoc bargaining, but it may significantly mitigate it. Overall, the presumed advantages of coherence and consistence of a common investment policy, based on a model agreement, are obvious.

Without prejudice to what is mentioned above, the key question about investment template real application is still prevailing. Would the European Model BIT provide significant enhancement of current regulations and would the EU really use it? Indeed, there are at least several profound obstacles to be analyzed. First, it may prove to be difficult to identify partners willing to negotiate BIT. Taking into account that the provisions of the model BIT are about the same, it would nevertheless probably always need some minor adjustments. However, the nature of partners in negotiations and the need for complex investment protection is diverse. For instance, imagine the specific needs of particular BIT with e.g. Russia, Canada and ASEAN. Second, it may be demanding to persuade Member States to support the new model with the assumption of an all-round approach, conclusion of EU BIT and consequent termination of their own BITs. Indeed, Member States must be able to identify explicit added value of model compared to their bilateral agreements. Third, the process of negotiation and conclusion of BIT is time consuming. For the most of Member States, it has taken decades to create their BITs networks – it would be vain to believe that the EU BITs, even using a well processed template, might by concluded in a few upcoming years. Fourth, negotiating capacities of the EU are definitely not unlimited. Having a model BIT would probably mean an improvement on condition that it is to be really carried out. Anyway, investment promotion and protection are nowadays covered sufficiently by the mix of the Member States BITs and FTAs provisions. Furthermore, the EU sources are supposedly too limited to anticipate major efforts of the EU to develop its own exclusive network of BITs in following years. In line with these concerns, the Model BIT is to be considered as a useful exercise and practice, but its scope of application seems currently to be dubious and limited.

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