Special Issue: The Anatomy of the (Invisible) EU Model BIT

An Introduction

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With the entry into force of the Treaty of Lisbon the EU has gained new powers in the area of international investment law and policy. The (new) EU competence, laid down in Article 207 TFEU as part of the Common Commercial Policy, includes an external treaty-making power in the field of foreign
direct (and possibly also portfolio) investment. The EU thus has the exclusive competence to negotiate and conclude stand-alone investment agreements – comparable to those international investment agreements (IIAs) that were concluded under the old status quo, in other words before the entry into force of the Treaty of Lisbon on 1 December 2009, by the EU Member States – as well as free trade agreements (FTAs) comprising also chapters on investment law.

As of April 2014, the EU is negotiating both stand-alone BITs, namely with China and Myanmar, and investment chapters as part of FTAs with India, Canada, Singapore, Japan, the United States, Egypt, Tunisia, Morocco, Jordan, Malaysia, Vietnam and Thailand. Even though the Commission stressed some years ago that “(a) new, ambitious model EU investment agreement should be developed in close coordination with member States,” the Commission remained reluctant on this issue and refused to draft a Model BIT, as is standard practice among most OECD members. With this policy, the Commission wants to avoid any limitation of its negotiating freedom. It is also worth noting that in the past only States have adopted a ‘Model BIT’ and this usually only after they had gained some experience in negotiating and concluding BITs with third states; the EU is still working on its international investment law approach, tackling the essential question of whether its new policy should follow the ‘best practices’ of its Member States, the North American model or whether it should adopt a new ‘modern’ and more balanced approach.

Thus, there is broad discussion among EU Member States, potential negotiating partners, the business sector, civil society and others as to the content that international investment chapters and agreements concluded by the EU and negotiated by the Commission should have. The objective of the second Vienna conference on (the) EU and international investment law, which took


3 See European Commission, Communication, Towards a comprehensive European international investment policy, 7 July 2010, COM(2010) 343 final, 4, 6 (“a one-size-fits-all model for investment agreements with 3rd countries would necessarily be neither feasible nor desirable.”). <trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf> (5 March 2014). One may question whether the unsuitability of a one-size-fits-all BIT is really a valid argument against a model BIT. After all, model BITs, as used by numerous BIT concluding states, are nothing more than negotiating templates which need to be adapted in specific cases, reflecting the needs and political wishes of particular contracting parties.