

# The New Great Challenge After the Entry Into Force of the Treaty of Lisbon: Bringing About a Multilateral EU-Investment Treaty

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Apart from the destiny of the bilateral investment treaties (BITs) of the Member States, the great challenge posed by the Treaty of Lisbon concerns the future use of the new EU competence over foreign direct investments.

The EU will be faced with several different possibilities. The EU may proceed with or without the involvement of the Member States. It may follow the dominant approach and seek to conclude BITs with third countries on its own. Alternatively, the EU may take on the thus far unsuccessful challenge of a multilateral treaty. Finally, the EU may consider the appropriateness of combining trade- and investment-related issues within one document or adhering to the classical investment treaty approach.

Further, after the EU chooses its approach towards foreign direct investment, many issues will arise regarding the substance of the new rules. Regarding content, the EU could adhere to the dominant approach of the EU Member States' model BITs. Alternatively, the EU could use the approach of states such as the USA, the current model BIT of which, although five times more extensive and accordingly also more sophisticated than the European ones, often provides lesser strength regarding investment protection. A connected issue is that the investor-state dispute resolution mechanism will be questioned.

How will these questions be met considering the EU Commission's main expertise lies in the field of trade? The rapid developments of international investment law especially during the past 6–10 years will not be familiar to all decision-makers and negotiators within the EU.

Unfortunately, the time to meet this challenge is short. The current investment protection systems of the Member States are remarkably divergent: two thirds of all Member States have only concluded at most 70 BITs, and some have only concluded 20. At the same time, as of January 2010, 127 of Germany's BITs were currently in force. Accordingly, the major problem lies in the fact that, owing to a lack of investment treaties, some Member States are by far less attractive for

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foreign direct investments than others. This makes the situation particularly grave for the Member States within eastern Europe which are seeking foreign direct investments but lack existing investment treaties which would influence the willingness to invest within those states. Numerically speaking, if every Member State were to enjoy the same the number of BITs as Germany, an additional 2000 treaties would need to be concluded.

The EU must fill this existing vacuum of protection. And considering that – as indicated – there are many capital-importing countries within the EU which are in urgent need of investments, this should be done quickly. This is particularly true if one considers that the current investment flows move particularly towards emerging markets and not the EU.

Against this background it seems by far more unreasonable to advise the EU to follow a bilateral approach than to consider a multilateral one. The former would require so much time that the competence would be rendered unusable.

Considering a multilateral approach seems *prima facie* daring. The last two attempts undertaken in this respect within the OECD and the WTO have failed. However, the situation for the EU is different. For third states, it is very attractive to conclude a treaty with 27 states at once rather than with each state individually. This gives the EU great bargaining power. The EU could invite third states to sign a treaty upon which the EU and its Member States have already agreed: a Europe-based open investment treaty. For the EU it seems a viable approach, especially considering that the alternative option of bilateral agreements is by no means excluded.

Regarding international investment law in its entirety, a multilateral agreement could bring about the needed legal certainty which has not been achieved thus far. For this reason, a multilateral option could prove to be an expedient solution to the problem of the lacking legal certainty and should seriously be considered. There have already been proposals on how such a solution could look. UNCTAD regards a multilateral solution as ideal. Perhaps policy-makers and government representatives – if permitted to express their personal views – would also feel the same. In fact, one might wonder why EU Member States such as Germany, France, the UK, and others should not have a major interest in investments being made also within the smaller partners, now that they have decided to share their economic fates with one another. The EU needs a reliable investment protection environment and the Treaty of Lisbon opens the window of opportunity to bring about such a system by way of a multilateral agreement.