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DRAFT REPORT

on the future of EU international investment policy
(2021/2176(INI))

Committee on International Trade

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MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

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The European Parliament,

- having regard to the Treaty on the Functioning of the European Union (TFEU), in particular Article 207(2) thereof,
- having regard to Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries¹,
- having regard to Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party²,
- having regard to Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment³,
- having regard to the case law of the Court of Justice of the European Union, notably its opinion 2/15 of 16 May 2017 on the Free Trade Agreement between the EU and the Republic of Singapore, its judgment of 6 March 2018 in case C-284/16 (preliminary ruling on *Slovak Republic v Achmea BV*), its opinion 1/17 of 30 April 2019 on the Comprehensive Economic and Trade Agreement between Canada and the EU and its Member States, its judgment of 2 September 2021 in case C-741/19 (preliminary ruling on *Republic of Moldova v Komstroy LLC*), and its judgment of 26 October 2021 in case C-109/20 (preliminary ruling on *Republic of Poland v PL Holdings Sàrl*),
- having regard to its resolution of 6 April 2011 on the future European international investment policy⁴,
- having regard to its resolution of 13 December 2011 on trade and investment barriers⁵,
- having regard to its resolution of 7 July 2015 on the external impact of EU trade and investment policy on public-private initiatives in countries outside the EU⁶,
- having regard to its resolution of 5 July 2016 on a new forward-looking and innovative

¹ OJ L 351, 20.12.2012, p. 40.

² OJ L 257, 28.8.2014, p. 121.

³ OJ L 198, 22.6.2020, p. 13.

⁴ OJ C 296 E, 2.10.2012, p. 34.

⁵ OJ C 168 E, 14.6.2013, p. 1.

⁶ OJ C 265, 11.8.2017, p. 17.

- future strategy for trade and investment⁷,
- having regard to the Commission communication of 11 December 2019 on the European Green Deal (COM(2019)0640),
 - having regard to the Commission report of 6 April 2020 on the application of Regulation (EU) No 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries (COM(2020)0134),
 - having regard to the Commission communication of 18 February 2021 entitled ‘Trade Policy Review – An Open, Sustainable and Assertive Trade Policy’ (COM(2021)0066),
 - having regard to the Commission communication of 14 October 2015 entitled ‘Trade for all – Towards a more responsible trade and investment policy’ (COM(2015)0497),
 - having regard to the Commission communication of 26 November 2014 entitled ‘An Investment Plan for Europe’ (COM(2014)0903),
 - having regard to the Commission report of 12 November 2020 on the implementation of EU trade agreements: 1 January 2019 – 31 December 2019 (COM(2020)0705),
 - having regard to the Paris Agreement on climate change, adopted on 12 December 2015,
 - having regard to the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part⁸, which entered into force on 1 May 2021, and in particular Title II thereof on services and investment,
 - having regard to the 2014 UN Convention on Transparency in Treaty-based Investor-State Arbitration, which entered into force on 18 October 2017 (the Mauritius Convention),
 - having regard to the trade and investment agreements concluded by the EU, in particular the ‘second generation’ agreements with countries such as Canada, Singapore, Vietnam and Japan,
 - having regard to the 2030 UN Agenda for Sustainable Development adopted in 2015, in particular the 17 Sustainable Development Goals thereto,
 - having regard to the UN Guiding Principles on Business and Human Rights, as endorsed by the UN Human Rights Council in 2011,
 - having regard to General Comment No 24 of 10 August 2017 of the UN Committee on Economic, Social and Cultural Rights on state obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities,
 - having regard to the 2019, 2020 and 2021 world investment reports of the

⁷ OJ C 101, 16.3.2018, p. 30.

⁸ OJ L 149, 30.4.2021, p. 10.

UN Conference on Trade and Development (UNCTAD),

- having regard to the 2015 UNCTAD Investment Policy Framework for Sustainable Development,
- having regard to the UNCTAD international investment agreement issues notes on investor-state dispute settlement cases: facts and figures for 2019 and 2020,
- having regard to the 2018 Organisation for Economic Co-operation and Development (OECD) working paper on international investment entitled ‘Societal benefits and costs of International Investment Agreements: a critical review of aspects and available empirical evidence’,
- having regard to the 2014 OECD working paper on international investment entitled ‘Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law’,
- having regard to the mandate given to Working Group III of the UN Commission on International Trade Law (UNCITRAL) in 2017 to work on a possible reform of investor-state dispute settlement,
- having regard to the negotiating directives issued by the Council in 2018 authorising the Commission to negotiate, on behalf of the EU and in the framework of UNCITRAL, a convention establishing a multilateral investment court for the settlement of investment disputes, and to the subsequent EU proposal thereon,
- having regard to the modernisation process of the Energy Charter Treaty, which was initiated in 2017, and to the EU’s text proposal thereon,
- having regard to Italy’s decision to withdraw from the Energy Charter Treaty as of 1 January 2015,
- having regard to the Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union⁹,
- having regard to the Declaration of the Governments of the Member States of 15 January 2019 on the legal consequences of the judgment of the Court of Justice in *Achmea* and on investment protection in the European Union,
- having regard to the Agreement between the United States, Mexico and Canada which entered into force on 1 July 2020, and in particular chapter 14 thereof on investment,
- having regard to the Regional Comprehensive Economic Partnership Agreement of the Association of Southeast Asian Nations, which entered into force on 1 January 2022, and in particular chapter 10 thereof on investment,
- having regard to the report of the UN Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises presented to the UN General Assembly on 27 July 2021 entitled ‘Human rights-compatible international

⁹ OJ L 169, 29.5.2020, p. 1.

- investment agreements’,
- having regard to Rule 54 of its Rules of Procedure,
 - having regard to the opinion of the Committee on Development,
 - having regard to the report of the Committee on International Trade (A9-0000/2022),
- A. whereas since the Lisbon Treaty, foreign direct investment has remained an exclusive competence of the European Union, as enshrined in Article 3(1)(e), Article 206 and Article 207 TFEU; whereas the EU’s international investment policy should be further reformed to address the current challenges;
- B. whereas the EU is the world’s largest destination and source of inbound and outbound international investments;
- C. whereas according to the case law of the Court of Justice, certain parts of the EU’s international investment policy, namely non-direct foreign investments (‘portfolio investments’) and the regime governing dispute settlement between investors and states, are a shared competence of the EU and its Member States;
- D. whereas around 1 500 bilateral investment treaties ratified by the Member States before the Lisbon Treaty are still in place, including the Energy Charter Treaty;
- E. whereas one of the top priorities of the European Green Deal is to respond to the challenges of climate change and environmental degradation; whereas all EU policies need to contribute to these goals, including investment policy; whereas substantial investments are needed worldwide in order to achieve the aims of the European Green Deal, meet the UN Sustainable Development Goals, and recover from the COVID-19 pandemic;
- F. whereas investment policy includes measures such as removing undue barriers to investment, monitoring the impact of foreign investment on strategic autonomy, national security and the real economy, and devising other tools to encourage and facilitate direct investment in sectors and places where it is needed the most; whereas most international investment agreements (IIAs) focus on investment protection, with or without investor-state adjudication;
- G. whereas the number of investor-state dispute settlement (ISDS) cases is rising each year, including against Member States; whereas about 15 % of cases known to be filed against Member States in 2020 were intra-EU disputes;
1. Believes that the EU’s investment policy needs to meet the expectations of investors and beneficiary states, but also the EU’s broader economic interests and external policy objectives; considers that EU international investment policy needs to be reformed in order to address a variety of challenges and transform it into an integrated and coherent policy framework;
 2. Underlines that investment can and should have a positive impact on sustainable development; points out that inbound and outbound investments need to meet the needs

of the real economy; calls on the Commission to review the EU's investment policy to ensure consistency with the European Green Deal and the Sustainable Development Goals;

3. Points out that the definition of investment as codified in EU IIAs covers not only greenfield investments, but also financial instruments that can be held for purely speculative purposes or for the extraction of rent;

Compatibility of IIAs with EU priorities

4. Stresses that an alarming number of investment claims target environmental measures; regrets the fact that various countries, including the Member States, are being sued in relation to policies on climate, the phasing out of fossil fuels, or the just transition;
5. Urges the Commission to exclude investments in fossil fuels or any other activities that pose significant harm to the environment and human rights from treaty protections, in particular investor-state arbitration mechanisms;
6. Points out that even in the absence of legal proceedings, the explicit or implicit threat of recourse to investment arbitration can enhance the position of investors in negotiations with states (the 'chilling effect');
7. Stresses that IIAs do not contain investor obligations; stresses that only foreign investors can launch investment cases against states; regrets the fact that having a case dismissed is the best possible outcome for respondent states;
8. Is concerned that recent EU IIAs still contain broad protection standards which can be used to challenge legitimate public policies; asks the Commission to only allow protection against discrimination, direct expropriation and the gross denial of justice, and to ensure that foreign investors are not accorded superior rights to those enjoyed by domestic investors;
9. Underlines the fact that EU IIAs negotiated after 2009 still include sunset clauses which prevent easy termination; points out that Member States and the other contracting parties can agree to neutralise sunset clauses;
10. Emphasises that under both customary international law and international human rights law, individuals are required to seek redress before domestic courts before bringing international proceedings against the state for wrongful acts; regrets the fact that international investment law, by contrast, usually does not require the exhaustion of domestic remedies;
11. Underlines that the considerable damages awarded by investment tribunals have imposed a significant financial burden on respondent states; points out that the use of valuation methods generally used by adjudicators is highly controversial owing to their very wide margin of discretion and reliance on highly complex and inherently speculative assumptions; invites the Commission to review the provisions governing compensation in EU IIAs;
12. Stresses that the increasing recourse by investors to third parties to finance their

litigation in exchange for a return in the outcome of an award (third-party funding) is adding incentives to increase the number of claims; invites the Commission to support the restriction of third-party funding for investor-state disputes;

13. Calls on the Member States to terminate or modernise any bilateral investment treaties that contain ISDS, any treaties that contain protection standards beyond protection against direct expropriation, nationality-based discrimination or the gross denial of justice, and any treaties that protect fossil fuel investments;
14. Calls on the Commission to ensure that all of the Member States' bilateral investment treaties are fully compatible with EU law; supports the Commission in strictly applying the conditions for authorising the negotiation, signature and conclusion of new agreements by Member States;

The Energy Charter Treaty (ECT)

15. Points out that the ECT is the most litigated investment agreement in the world today; welcomes efforts to modernise the ECT and the EU's position to exclude protection for most fossil fuel investments; notes that investments considered 'significantly harmful' under the EU taxonomy would remain protected according to the EU's position; underlines that amending the ECT requires unanimity of all contracting parties voting at the annual conference;
16. Urges the Commission to ensure that a revised ECT will immediately prohibit fossil fuel investors from suing contracting parties for pursuing policies to phase out fossil fuels in line with their commitments under the Paris Agreement; calls on the Commission and the Member States to start preparing a coordinated exit from the ECT with a view to formal submission to the Council in the event of the negotiating objectives not being achieved by June 2022;
17. Welcomes the Court of Justice's clarification that ISDS provisions in the ECT are not applicable in the case of intra-EU disputes; notes with concern that the *Achmea* ruling did not deter arbitration tribunals from continuing to hear intra-EU investment disputes;

Multilateral efforts to reform ISDS

18. Welcomes the fact that UNCITRAL Working Group III has been engaging in deliberations on a possible multilateral reform of ISDS since 2017; notes that 60 states agreed by consensus that UNCITRAL's work must address structural reform options; calls on the Commission to constructively engage on all topics raised during UNCITRAL discussions and to take account of them in future EU IIAs;
19. Notes that in the context of the UNCITRAL Working Group III discussions, the EU and its Member States are pursuing the establishment of a standing mechanism to resolve investment disputes: the multilateral investment court; stresses, however, that this proposal does not cover the modernisation of substantive protection standards;
20. Calls on the Member States to adopt without delay the proposal for a Council decision on the conclusion, on behalf of the EU, of the UN Convention on Transparency in Treaty-based Investor-State Arbitration;

An EU investment policy beyond investor-state adjudication

21. Points out that on a global scale in 2017, 2019 and 2020, more investment treaties were terminated than new IIAs concluded; notes that recently concluded mega-regional IIAs employ an increasingly cautious approach to investor-state adjudication;
22. Urges the Commission to develop an EU foreign investment strategy to incentivise and protect sustainable investments, without relying on investor-state adjudication;
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23. Instructs its President to forward this resolution to the Council, the Commission, and the governments and parliaments of the Member States.