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European international investment policy

European Parliament resolution of 6 April 2011 on the future European international investment policy (2010/2203(INI))

The European Parliament,

- having regard to the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 7 July 2010 entitled ‘Towards a comprehensive European international investment policy’ (COM(2010)0343), as well as to the Commission Proposal of 7 July 2010 for a Regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries (COM(2010)0344),
 - having regard to the Communication from the Commission of 3 March 2010 entitled ‘Europe 2020 – A strategy for smart, sustainable and inclusive growth’ (COM(2010)2020), and to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 9 November 2010 entitled ‘Trade, Growth and World Affairs – Trade Policy as a core component of the EU's 2020 strategy’ (COM(2010)0612),
 - having regard to the Council Conclusions of 25 October 2010 on a comprehensive European international investment policy,
 - having regard to the updated OECD Guidelines for Multinational Enterprises,
 - having regard to the case-law of the Court of Justice of the European Union on the failure by Member States to fulfil their obligations, and notably to the judgment of 3 March 2009 in *Commission v Austria* (Case C-205/06), the judgment of 3 March 2009 in *Commission v Sweden* (Case C-249/06), and the judgment of 19 November 2009 in *Commission v Finland* (Case C-118/07),
 - having regard to Rule 48 of its Rules of Procedure,
 - having regard to the report of the Committee on International Trade and the opinions of the Committee on Development and the Committee on Economic and Monetary Affairs (A7-0070/2011),
- A. whereas the Treaty of Lisbon brought foreign direct investment (FDI) under exclusive EU competence, as enshrined in Articles 3(1)(e), 206 and 207 of the Treaty on the Functioning of the European Union (TFEU),
- B. whereas since 1959 more than 1 200 bilateral investment treaties (BITs) have been concluded by the Member States at bilateral level and nearly 3 000 BITs have been concluded in total,
- C. whereas it is generally acknowledged that inward investment can improve host countries’ competitiveness but adjustment assistance for low-skilled workers may be necessary in the

case of outward investment; whereas it is the responsibility of any government to encourage the beneficial impacts of investments while preventing any harmful effects,

- D. whereas Articles 206 and 207 TFEU do not define FDI, whereas the Court of Justice of the European Union¹ has specified its understanding of the term FDI, on the basis of three criteria: it should be considered as a long-lasting investment, representing at least 10 % of the affiliated company's equity capital / shares and providing the investor with managerial control over the affiliated company's operations, whereas this definition is in line with those of the IMF and the OECD and is opposed to, in particular, portfolio investments and intellectual property rights; whereas it is difficult to distinguish clearly between FDI and portfolio investments and applying a rigid legal definition to investment practice in the real world will be hard,
- E. whereas some Member States use broad definitions of the term 'foreign investor', with a simple postal address deemed sufficient to determine the nationality of an enterprise, whereas this has enabled some enterprises to file suits against their own countries via BITs signed by third countries, whereas any European company should be able to rely on future EU investment agreements or free trade agreements (FTAs) with investment chapters,
- F. whereas the emergence of new countries with strong investment capacity as local or global powers has changed the classic view whereby the only investors were from developed countries,
- G. whereas after the first dispute settlement cases of the 1990s, and in spite of generally positive experiences, a number of problems became clear because of the use of vague language in agreements being left open for interpretation, particularly concerning the possibility of conflict between private interests and the regulatory tasks of public authorities, for example in cases where the adoption of legitimate legislation led to a state being condemned by international arbitrators for a breach of the principle of 'fair and equitable treatment',
- H. whereas the USA and Canada, which were among the first states to face such rulings, have adapted their model BITs in order to restrict the breadth of interpretation by the arbitration and ensure better protection of their public intervention domain,
- I. whereas the Commission has compiled a list of countries which will be privileged partners for the negotiation of the first investment agreements (Canada, China, India, Mercosur, Russia and Singapore),
- J. whereas the newly established European External Action Service (EEAS) shall also reinforce the EU's global presence and role, including the promotion and defence of the EU's trade goals, in the investment field,
- 1. Acknowledges that, as a result of the Treaty of Lisbon, FDI now falls under the exclusive competence of the EU; notes that this new EU competence poses a double challenge, on one hand for managing the existing BITs and on the other hand for defining a European investment policy which meets the expectations of investors and beneficiary states but also the EU's broader economic interests and external policy objectives;

¹ Judgment of 12 December 2006 in Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue (Case C-446/04).

2. Welcomes this new EU competence and calls on the Commission and the Member States to seize this opportunity to build with Parliament an integrated and coherent investment policy which promotes high-quality investments and makes a positive contribution to worldwide economic progress and sustainable development; takes the view that Parliament must be adequately involved in the shaping of the future investment policy and that this requires proper consultation on the mandates for upcoming negotiations, as well as regular meaningful briefings on the state of ongoing negotiations;
3. Notes that the EU is an important economic bloc that carries considerable weight in negotiations; believes that a common policy on investment will meet the expectations of both investors and the states concerned and help increase the competitiveness of the EU and its businesses and to increase employment;
4. Notes the need for a coordinated European framework, one that is designed to provide certainty and to encourage the promotion of the principles and objectives of the EU;
5. Recalls that the current phase of globalisation has seen a dramatic increase in FDI, reaching in 2007, the year before investment was affected by the global economic and financial crisis, a record high of almost EUR 1 500 billion, with the EU being the largest source of FDI in the entire global economy; underlines, however, that in 2008 and 2009 investment has declined due to the global financial and economic crisis; stresses also that about 80 % of the total value of global FDI concerns cross-border mergers and acquisitions;
6. Welcomes the Commission's Communication 'Towards a comprehensive European international investment policy' but stresses that, while focusing extensively on investor protection, it should better address the right to protect the public capacity to regulate and meet the EU's obligation to exercise policy coherence for development;
7. Considers that investment can have a positive impact on growth and jobs, not only in the EU but also in developing countries, insofar as investors actively contribute to the development goals of the host states, i.e. by supporting the local economy through technology transfer and by utilising local labour and inputs;
8. Calls on the Commission to bear in mind the lessons learnt on a multilateral, plurilateral and bilateral level, in particular regarding the failure of OECD negotiations on a Multilateral Agreement on Investment;
9. Urges the Commission to develop the EU's investment strategy in a careful and coordinated manner drawing on the best practices of BITs; notes the divergence of content within Member State agreements and calls on the Commission to reconcile these divergences to provide a strong EU template for investment agreements, which would also be adjustable according to the level of development of the partner country;
10. Calls on the Commission to issue non-mandatory guidance as expediently as possible, e.g. in the form of a template for BITs, that may be used by Member States to enhance certainty and consistency;

Definitions and scope

11. Asks the Commission to provide a clear definition of the investments to be protected, including both FDI and portfolio investment; considers, however, that speculative forms of

investment, as defined by the Commission, shall not be protected; insists that where intellectual property rights are included in the scope of the investment agreement, including these agreements where draft mandates have already been proposed, the provisions should avoid negatively impacting the production of generic medicines and must respect the TRIPS exceptions for public health;

12. Notes with concern that negotiating a broad variety of investments would lead to mixing exclusive and shared competences;
13. Calls for the introduction of the term ‘EU investor’ which would, reflecting the spirit of Article 207 TFEU, underline the significance of promoting investors from all Member States on equal terms, ensuring them conditions of functioning and protection of their investments on equal footing;
14. Recalls that the standard EU Member State BIT uses a broad definition of ‘foreign investor’; asks the Commission to assess where this has led to abusive practices; asks the Commission to provide a clear definition of a foreign investor based on this assessment and drawing on the latest OECD benchmark definition of FDI;

Investor protection

15. Stresses that investor protection for all EU investors must remain the first priority of investment agreements;
16. Notes that the negotiation of BITs is a time-consuming process; calls on the Commission to invest in terms of its personnel and its material resources in the negotiation and conclusion of EU investment agreements;
17. Considers that the request made by the Council in its conclusions on the Communication – that the new European legal framework should not negatively affect investor protection and guarantees enjoyed under the existing agreements – could create a risk of having any new agreement opposed, and could lead to the necessary balance between investor protection and the protection of the right to regulate – in an era of increased inward investment – being put at risk; considers, moreover, that such a formulation of the evaluation criterion may contradict the meaning and spirit of Article 207 TFEU;
18. Believes that the need to identify best practices, to which the Council’s conclusions also point, is a more sensible and more effective option, enabling the development of a consistent European investment policy;
19. Considers that future investment agreements concluded by the EU should be based on the best practices drawn from Member State experiences and include the following standards:
 - non-discrimination (national treatment and most favoured nation), with a more precise wording in the definition mentioning that foreign and national investors must operate ‘in like circumstances’ and allowing some flexibility in the MFN-clause in order not to obstruct regional integration processes in developing countries;
 - fair and equitable treatment, defined on the basis of the level of treatment established by international customary law,

- protection against direct and indirect expropriation, giving a definition that establishes a clear and fair balance between public welfare objectives and private interests, and allowing for adequate compensation in accordance with the damages occurred in the event of illegitimate expropriation;
20. Asks the Commission to assess the potential impact of the inclusion of an umbrella-clause in future European investment agreements and to present a report to both the European Parliament and the Council;
 21. Calls on the Commission to ensure reciprocity when negotiating market access with its main developed trading partners and the major emerging economies, while bearing in mind the need to exclude sensitive sectors and to maintain asymmetry in the EU's trading relations with developing countries;
 22. Notes that the expected improvement in certainty will help SMEs to invest abroad, and notes in this regard that the voice of SMEs must be heard during negotiations;

Protecting the right to regulate

23. Stresses that future investment agreements concluded by the EU must respect the capacity for public intervention;
24. Expresses its deep concern regarding the level of discretion of international arbitrators to make a broad interpretation of investor protection clauses, thereby leading to the ruling out of legitimate public regulations; calls on the Commission to produce clear definitions of investor protection standards in order to avoid such problems in the new investment agreements;
25. Calls on the Commission to include in all future agreements specific clauses laying down the right of parties to the agreement to regulate, inter alia, in the areas of protection of national security, the environment, public health, workers' and consumers' rights, industrial policy and cultural diversity;
26. Underlines that the Commission shall decide on a case-by-case basis on sectors not to be covered by future agreements, for example sensitive sectors such as culture, education, public health and those sectors which are strategically important for national defence, and asks the Commission to inform the European Parliament about the mandate it received in each case; notes that the EU should also be aware of the concerns of its developing partners and should not call for more liberalisation if the latter deem it necessary for their development to protect certain sectors, particularly public services;

Inclusion of social and environmental standards

27. Stresses that the EU's future policy must also promote investment which is sustainable, respects the environment (particularly in the area of extractive industries) and encourages good quality working conditions in the enterprises targeted by the investment; asks the Commission to include, in all future agreements, a reference to the updated OECD Guidelines for Multinational Enterprises;
28. Reiterates, with regard to the investment chapters in wider FTAs, its call for a corporate social responsibility clause and effective social and environmental clauses to be included in

every FTA the EU signs;

29. Requests that the Commission assess how such clauses have been included in Member State BITs and how they could be included in future stand-alone investment agreements as well;
30. Welcomes the fact that a number of BITs currently have a clause which prevents the watering-down of social and environmental legislation in order to attract investment and calls on the Commission to consider the inclusion of such a clause in its future agreements;

Dispute settlement mechanism and EU responsibility

31. Believes that changes must be made to the present dispute settlement regime, in order to include greater transparency, the opportunity for parties to appeal, the obligation to exhaust local judicial remedies where they are reliable enough to guarantee due process, the possibility to use amicus curiae briefs and the obligation to select one single place of investor-state arbitration;
32. Takes the view that, in addition to state-to-state dispute settlement procedures, investor-state procedures must also be applicable in order to secure comprehensive investment protection;
33. Is aware that the EU cannot use existing International Centre for Settlement of Investment Disputes (ICSID) and United Nations Commission on International Trade Law (UNCITRAL) dispute settlement mechanisms since the EU as such is a member of neither organisation; calls on the EU to include a chapter on dispute settlement in each new EU investment treaty in line with the reforms suggested in this resolution; requests that the Commission and the Member States take up their responsibility as major international players to work towards the necessary reforms of the ICSID and UNCITRAL rules;
34. Calls on the Commission to put forward solutions that enable small businesses to improve their funding of the high cost of dispute settlement procedures;
35. Calls on the Commission to present, as soon as possible, a regulation on how responsibilities are to be divided between the EU and national levels, particularly in financial terms, in the event that the EU loses a case in international arbitration;

Choice of partners and powers of Parliament

36. Endorses the principle that priority partners for future EU investment agreements shall be countries that have great market potential but where foreign investments need better protection;
37. Notes that investment risk is generally higher in developing and least developed countries and that strong, effective investor protection in the form of investment treaties are key to protecting European investors and can improve governance, thereby bringing about the stable environment needed to increase FDI into these countries; notes that, for investment agreements to further benefit these countries, they should also be based on investor obligations in terms of compliance with human rights and anti-corruption standards as part of a broader partnership between the EU and developing countries for the purpose of reducing poverty; calls on the Commission to assess viable future partners, drawing on Member State best practices with BITs;

38. Expresses its concern that FDI in least developed countries is extremely limited and tends to be concentrated in natural resources;
39. Considers that in developing countries greater support should be given to local firms, notably through incentives for strengthening their productivity, engaging in closer cooperation and improving workforce skills – areas of considerable potential in terms of boosting economic development, competitiveness and growth in developing countries; encourages, likewise, the transfer of new, green EU technologies to developing countries, as the best way of promoting green and sustainable growth;
40. Urges Parliament's position to be taken fully into account by the Commission and the Member States before investment negotiations are initiated, as well as during such negotiations; recalls the content of the Framework Agreement on relations between the European Parliament and the Commission and calls on the Commission to consult Parliament on draft negotiating mandates in good time to enable it to state its position, which must, in turn, be properly taken into account by the Commission and the Council;
41. Stresses the need to include the role of the EEAS delegations in the strategy of the future investment policy, acknowledging their potential and local know-how as strategic assets in achieving the new policy goals;

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42. Instructs its President to forward this resolution to the Council and Commission, to the Member States, to the European Economic and Social Committee, and to the Committee of the Regions.