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## TEXTS ADOPTED

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### **P9\_TA(2022)0268**

#### **Future of EU international investment policy**

##### **European Parliament resolution of 23 June 2022 on the future of EU international investment policy (2021/2176(INI))**

*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 countries<sup>1</sup>,
- 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 party<sup>2</sup>,
- 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 investment<sup>3</sup>,
- 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 policy<sup>4</sup>,

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<sup>1</sup> OJ L 351, 20.12.2012, p. 40.

<sup>2</sup> OJ L 257, 28.8.2014, p. 121.

<sup>3</sup> OJ L 198, 22.6.2020, p. 13.

<sup>4</sup> OJ C 296 E, 2.10.2012, p. 34.

- having regard to its resolution of 13 December 2011 on trade and investment barriers<sup>1</sup>,
- 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 EU<sup>2</sup>,
- having regard to its resolution of 5 July 2016 on a new forward-looking and innovative future strategy for trade and investment<sup>3</sup>,
- 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 part<sup>4</sup>, 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,

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<sup>1</sup> OJ C 168 E, 14.6.2013, p. 1.

<sup>2</sup> OJ C 265, 11.8.2017, p. 17.

<sup>3</sup> OJ C 101, 16.3.2018, p. 30.

<sup>4</sup> OJ L 149, 30.4.2021, p. 10.

- 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 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 Union<sup>1</sup>,
- 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,

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<sup>1</sup> OJ L 169, 29.5.2020, p. 1.

- 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 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 (A9-0166/2022),
- A. whereas, since the entry into force of 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 reform path needs to further accelerate and be reinforced to address the current challenges;
  - B. whereas the EU is the world’s largest destination and source of inbound and outbound international investments; whereas they contribute to the sustainable economic growth of the EU and to job creation, although available empirical evidence has not shown a direct causal relationship between international investment agreements (IIAs) and the attraction of foreign direct investment;
  - C. whereas global foreign direct investment (FDI) flows, which had already been declining since 2015, experienced a dramatic drop in 2020 (-38 %)<sup>1</sup> due to the COVID-19 crisis; whereas increasing outward and inward FDI remains a key element of the path to recovery for the EU and for many other economies;
  - D. 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;
  - E. whereas around 1 500 bilateral investment treaties ratified by the Member States before the Lisbon Treaty are still in place, and include the old model of investor-state dispute settlement, as does the Energy Charter Treaty; whereas none of the IIAs negotiated by the EU since the Lisbon Treaty has entered into force;
  - F. whereas the European Green Deal aims at responding 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 (SDGs) and recover from the COVID-19 pandemic; whereas working against climate change and environmental degradation, and creating

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<sup>1</sup> Organisation for Economic Co-operation and Development, ‘FDI in Figures’, April 2021.

more attractive investment conditions and supporting businesses are among the six priorities<sup>1</sup> of the EU between 2019 and 2024;

- G. whereas FDI and EU investment policy should also play a key role in achieving the objectives of open strategic autonomy, diversifying supply chains and contributing to sustainable economic growth, job creation and integration in global value chains, as well as in seeking to promote conditions for EU investors abroad that reflect the level of openness that foreign investors enjoy in the EU, while taking into account the levels of development of third countries and the need to provide for differentiated treatment;
- H. whereas developing countries face a gap of USD 2,5 trillion in annual financing to achieve the SDGs by 2030; whereas FDI is an instrument for financing the 2030 Agenda for Sustainable Development and the corresponding SDGs; whereas such capital can support job creation and social and environmental improvements as set out in the SDGs; whereas the aim of attracting investment should go hand in hand with the acknowledgement, in the context of IIAs, that the parties to these agreements should seek to improve their levels of environmental or labour protection, and not weaken or reduce them;
- I. whereas the EU taxonomy aims at facilitating the shift of investments from unsustainable economic activities to those that are needed to achieve environmental sustainability, and more specifically climate neutrality in the next 30 years;
- J. 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 IIAs focus on investment protection, with or without investor-state adjudication;
- K. 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;
- L. whereas most investment treaties do not specify how the notions of ‘full reparation’ and ‘fair market value’ of an investment are to be ascertained; whereas panels have in the last decade predominantly interpreted such notions by using ‘forward-looking’ valuation techniques based on discounted cash flow (DCF) methods, which in many cases have led panels to rule on amounts of compensation that are much higher than the aggregate amounts of expenditure actually incurred by investors in host countries;
- M. whereas the EU is a global leader in investment policy reform; whereas significant reform of investment policy has been undertaken at European and international level since the entry into force of the Lisbon Treaty, at the insistence and with the support of Parliament; whereas the EU has launched and concluded IIAs with partner countries, reformed investment protection provisions, replaced ISDS with the investment court system (ICS), launched multilateral negotiations for an investment court, proposed legislation to regulate foreign subsidies, and adopted legislation for the screening of

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<sup>1</sup> A European Green Deal; a Europe fit for the digital age; an economy that works for people; a stronger Europe in the world; promoting our European way of life; a new push for European democracy.

inward foreign direct investment; whereas these developments are significant steps in the right direction for a modernised and sustainable investment policy; whereas much more remains to be done to advance this reform agenda;

- N. whereas the increasing recourse by investors to third parties to finance their litigation in exchange for a return or other financial interest in the outcome of a dispute (third-party funding) has exacerbated the imbalances underpinning compensation practices in litigation, by further reducing the risks for investors of pursuing a claim, and thereby adding incentives to increase the number of claims; whereas third-party funding may increase the bargaining power of claimants to the detriment of states with limited resources and weaker regulatory frameworks;
1. Underlines that investment can and should have a positive impact on sustainable economic growth, job creation and sustainable development, and contribute to the SDGs; stresses, therefore, its importance for the transformation of the EU economy; points out that this positive impact depends on governments' capacity to regulate foreign investments; points out that inbound and outbound investments must 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 SDGs, as well as with EU values, including respect for human rights and the social standards as defined by the European Pillar of Social Rights;
  2. Believes that the EU's investment policy needs to meet the expectations of investors and beneficiary states, as well as the EU's broader economic interests and external policy objectives; recalls its request for an integrated and coherent policy framework, which promotes high-quality and sustainable investments; welcomes the efforts undertaken by the Commission since 2010 to reform the Union's investment policy in that direction; considers that EU international investment policy needs to be further reformed in order to better address a variety of challenges and continue its transformation into an integrated and coherent policy framework;
  3. Considers that IIAs should facilitate green, gender-sensitive and inclusive sustainable investments, adequately protect investors, contribute to the resilience of the single market while safeguarding policy space in host states, and encourage the exchange of best practices, skills and know-how, in accordance with the Organisation for Economic Co-operation and Development (OECD) Guidelines for multinational enterprises on corporate social responsibility;
  4. Is concerned that according to the OECD, developing countries faced a shortfall of USD 1,7 trillion in 2020 due to the COVID-19 crisis, in addition to the existing USD 2,5 trillion funding gap; stresses that the EU's investment policy should help developing countries, notably African countries, to attract FDI and to reduce the funding gap to achieve the SDGs;
  5. Considers that EU companies need adequate protection for their investments abroad; points out that protected investments, as codified in the EU's IIAs, should not include speculative forms of investment, financial instruments or portfolio investments that can be held for speculative purposes; calls on the Commission to build on recent IIAs<sup>1</sup> to

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<sup>1</sup> Such as the EU-Canada Comprehensive Economic and Trade Agreement (Annex 8b paragraph 4 which defines public debt as a debt instrument of any level of government

exclude public debt instruments from their scope; considers that financial instruments which can be withdrawn at any time do not require protection; asks the Commission to continue its endeavours to improve the definition of protected investments so as to make sure that IIAs protect only investments that make a substantial commitment of capital or other resources for a minimum number of years, for which there is an assumption of risk and expectation of profit; is of the opinion that protected investments should effectively contribute to the development of the host country; asks the Commission and the Member States to consider this criterion as defined in international law in the definition of protected investments for future agreements;

### ***Market access***

6. Welcomes the fact that recent investment agreements have a positive focus on market access and investment liberalisation and seek the removal of barriers to the establishment and operation of EU investors in foreign markets;
7. Calls on the Commission to seek conditions for EU investors abroad that reflect the level of openness that foreign investors enjoy in the EU, while taking into account the level of development of third countries and the need to provide for differentiated treatment; stresses the need for IIAs to safeguard the ability of states to regulate foreign investments in their jurisdiction; calls on the Commission to monitor barriers to the establishment and operation of EU investors in foreign markets, including discriminatory practices; welcomes the Commission's focus on the enforcement of existing commitments and underlines that this should also apply to investment-related commitments;
8. Urges the Commission to strictly protect the policy spaces of the EU and the Member States, notably on energy, agriculture, fisheries, audiovisual, telecommunication and digital issues, as well as public services, when liberalising investments; stresses that liberalising investments should go hand in hand with safeguards to avoid exacerbating economic instability, especially in developing countries;
9. Underlines the importance of maintaining, strengthening and implementing the clauses in all investment agreements that prohibit the lowering of standards, as they are critical to avoid a race to the bottom in countries aiming to attract foreign investment; calls on the Commission to further analyse the effectiveness of such clauses, in particular in developing countries, to ensure that tax policy and development finance are aligned to support a 'race to the top';

### ***Investment facilitation***

10. Points out that investment facilitation can contribute to unlocking investment opportunities in developing countries, notably for small and medium-sized enterprises, and to achieving the SDGs by helping to mobilise higher levels of investment to promote inclusive and sustainable growth and poverty reduction, as it supports a longer-term presence of foreign investors in the host economy and improves linkages between foreign investors and local companies; invites the Commission to support developing countries in improving the investment climate in their jurisdiction, both through

development cooperation tools and through bilateral agreements; believes that investment facilitation is also a good instrument to improve the EU's competitiveness and economic growth;

11. Stresses that international agreements on investment facilitation should support and incentivise investments that advance sustainable development and avoid incentives for investments that cause harm to the environment, climate or society; notes that tax revenues are crucial for developing countries to provide basic public services; urges the Commission to work at multilateral level to promote sustainable investment facilitation which is not pursued through competitive tax breaks; highlights that introducing innovative investment facilitation measures can contribute to achieving the SDGs by helping to mobilise higher levels of investment to promote inclusive and sustainable growth and poverty reduction, as it supports a longer-term presence of foreign investors in the host economy, and to develop better linkages between foreign investors and local companies;
12. Acknowledges the role taken by the EU in the World Trade Organization (WTO) negotiations regarding the Joint Initiative on Investment Facilitation for Development; underscores that more than two thirds of WTO members are participating in these negotiations; believes that caution is needed considering the very broad scope of the agreement under negotiation; emphasises the need to ensure that these negotiations abide by the rules of the WTO Marrakesh Agreement, which require consensus and overall transparency;
13. Underlines the importance of an overall EU approach as regards investment facilitation at both bilateral and multilateral level, with an overarching focus on cooperation, including capacity building and technical assistance, notably as regards support for digitalisation in developing countries; welcomes the Commission's work on new standalone investment facilitation agreements, focusing on supporting sustainable and inclusive investments; asks the Commission, in that context, to pursue negotiations with African partners that avoid creating administrative burdens for developing countries, while specifying the type of sustainable investments that will be facilitated; takes note of the fact that similar investment facilitation provisions are being negotiated in the future Investment Protocol of the African Continental Free Trade Area; invites the Commission to continue supporting those negotiations;
14. Supports the Commission in its approach, at WTO level, to ensure, via a strong firewall, that investment facilitation disciplines cannot be imported in investor-state disputes; believes that disputes arising under the Joint Initiative on Investment Facilitation for Development should be resolved via mediation and cooperation;
15. Underlines that investment facilitation provisions at both bilateral and WTO level should not only focus on creating obligations for public authorities in host countries, but should also clarify the obligations of home countries and their national investors regarding their investments abroad; emphasises, in that respect, the need to integrate enforceable provisions as regards corporate social responsibility, human rights and environmental due diligence, as well as anti-corruption safeguards in investment facilitation frameworks; calls on the Commission to include an enforceable chapter on sustainable development in all investment facilitation agreements with third countries, as well as monitoring mechanisms on the activities supported by FDI flows;



16. Welcomes the Commission's proposal for an instrument to tackle distortions caused by foreign subsidies that constitute an unfair form of investment, and calls for its swift adoption; calls on the Commission and the Member States to engage in negotiations at WTO level with a view to tackling distortions of competition, particularly in the area of industrial subsidies;

### ***Enhancing the screening of foreign direct investment in the EU***

17. Welcomes the entry into force of the FDI Screening Regulation in 2019; points out that this screening mechanism aims to establish cooperation and potentially limit foreign investments in strategic sectors in order to protect the Union and its Member States, as well as to analyse and screen cases where the acquisition or control of a particular company, infrastructure or technology may create a security or public order risk in the EU;
18. Underlines the importance of this mechanism as a step towards the better monitoring of the contribution of FDI to Europe's strategic interests; calls on the Commission, in the context of its forthcoming review process, to provide more granular data on whether inward FDI flows support sustainable economic activities and greenfield investments, to assess different options to monitor the activities supported by outward flows, and to assess the possibility of further specifying whether other sectors should be considered as strategic sectors; in addition, asks the Commission to explore the possibility of strengthening the EU foreign direct investment screening mechanism to give it, with the agreement of the Member States, the power to block an investment that would create a risk to security and public order;
19. Calls on those Member States that do not yet have one, to set up such a national foreign direct investment screening mechanism in order to ensure that European cooperation is effective;

### ***Compatibility of IIAs with EU priorities***

20. Notes that an increasing number of legal proceedings before investment tribunals target environmental measures; deplores 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;
21. Stresses that global efforts to combat climate change will require a rapid transition to renewable energy and fast government action to reduce reliance on fossil fuels; urges the Commission and the Member States to ensure consistency between IIAs and the European Green Deal, environmental policies, labour rights and human rights, by excluding from treaty protection investments in fossil fuels or any other activities that pose significant harm to the environment and human rights, and by including in the sustainable development chapters provisions that help compliance with the Paris Agreement, international treaties on labour and gender equality, and provisions aiming at improving the domestic framework regulating foreign investment;
22. Notes with concern the asymmetry of certain IIAs in which foreign investors can pursue investment cases against states, while governments, workers and affected communities are unable to pursue in arbitration transnational corporations that fail to respect human rights, public health or labour and environmental laws; stresses that, similarly, the

Multilateral Investment Court (MIC) is only intended for adjudicating in cases in which foreign investors sue states;

23. Points out that even in the absence of legal proceedings, the explicit or implicit threat of recourse to investment lawsuits can enhance the position of investors in negotiations with states (the ‘chilling effect’); stresses in this regard that recent EU IIAs stipulate the principle that governments have the right to regulate for legitimate public policy objectives<sup>1</sup>, including in a manner that may negatively affect the operation of an investment or an investor’s expectation of profits; underlines, however, that this right does not prevent states from having to comply with obligations established in IIAs, nor does it preclude investment claims or damages following the exercising of that right; is concerned that policy decision-making might therefore be delayed or decisions watered down;
24. Underlines that, as a result, more public funds may be spent on compensating the fossil fuel sector than would be the case without the threat of investment litigation, making it more costly and thus more difficult for states to undertake energy transition measures, and representing an overall subsidy provided by taxpayers to the fossil fuel sector;
25. Notes that in numerous investor–state arbitration cases, businesses have challenged actions that states claimed to have taken to address local concerns or unrest about a project’s impact; calls on the Commission and the Member States to include a right of standing for affected third parties in future IIAs; believes that tribunals should follow the case-law of the International Court of Justice and deem cases inadmissible when determinations of fact or law might prejudice affected local or indigenous communities which are not party to the investment proceedings; asks the Commission and the Member States to ensure transparency and support the involvement of vulnerable local communities, and in particular of indigenous people impacted by extractive or logging activities, in the negotiation and implementation of IIAs, since foreign investments can have far-reaching impacts on local communities;

### ***Reformed approach***

26. Welcomes the new investment protection agreement model drawn up by the Commission in 2015 as a step in the right direction; notes, however, that no agreement which contains it has yet entered into force; recalls its position that the EU and its Member States should not sign or ratify investment protection treaties that include the ISDS mechanism; underscores the importance of making procedural reforms to investor-state dispute settlement; welcomes the fact that the ICS includes the creation of a fixed roster of arbitrators, an appeal mechanism, a code of conduct for arbitrators and improved transparency in arbitration proceedings; notes that the ICS still constitutes international arbitration and stresses that, unlike in national courts, arbitrators on the ICS roster would have discretion not to necessarily take into consideration relevant public interest laws when interpreting the substantive provisions enshrined in IIAs; regrets that arbitrators would still be paid on a case-by-case basis;

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<sup>1</sup> Including on public health, social services, public education, safety, environment or public morals, social or consumer protections, privacy and data protection, or the promotion and protection of cultural diversity.

27. Urges the Commission to fully support and accelerate negotiations to expand investor obligations and their enforcement; believes that investor obligations should not only be included in EU IIAs, but should also apply via separate binding and enforceable international instruments, and via robust domestic frameworks for human rights and environmental due diligence; notes that progress in these areas and the continued strengthening of EU IIA provisions should ensure that EU investors in non-EU countries, in particular in developing countries, transparently demonstrate their strategies to actively contribute to the achievement of the SDGs and the goals of the Paris Agreement, and are subject to accountability mechanisms, in particular by providing access to justice for victims in those countries;
28. Welcomes provisions in IIAs regarding environmental, labour and corporate responsibility obligations for states and investors, as well as clauses stipulating the horizontal principle that standards should not be lowered to attract investment; regrets, however, the fact that the reform of investor obligations has not kept pace with the reform of ISDS;
29. Calls on the Commission and the Member States to support the entry into force of the instrument on transnational corporations and other business enterprises with respect to human rights<sup>1</sup>, currently being drawn up by the UN Human Rights Council, which is aimed at regulating the activities of transnational companies and firms;
30. Welcomes the fact that, since 2016, EU IIAs containing investment protection clauses include more precise wording for some protection standards, as well as the right to regulate; underlines that EU IIAs should not allow broad protection standards to be used to challenge legitimate public policies; considers that protection standards should focus specifically on creating a level playing field between foreign and domestic investors, preventing and offering redress in cases where EU investors in non-EU countries are discriminated against, are denied access to justice, or fully lose the enjoyment of their investment to the benefit of the host state, including in times of war, and reciprocally for non-EU investors in the EU; asks the Member States and the Commission to avoid including ambiguous terminology in substantive clauses, and to continue reviewing protection standards on the basis of available evidence;
31. Underlines the fact that EU IIAs negotiated after 2009 still include sunset clauses which prevent easy termination; takes note of recent negotiations in which parties agreed to a five-year sunset clause with the possibility to agree on an extension of five additional years in case no replacement is found; calls on Member States and the other contracting parties to neutralise sunset clauses in current agreements, and to significantly shorten sunset clauses in new investment agreements;
32. 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; believes, that IIAs should require recourse through domestic justice systems to be exhausted before foreign investors can resort to an arbitration tribunal, as

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<sup>1</sup> Legally binding instrument to regulate, international human rights law, the activities of transnational corporations and other business enterprises <https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc>.

is the case in international human rights law; stresses that in the event of gross denial of justice in domestic courts, foreign investors should directly be able to seek international dispute settlement;

### ***IIA ratification***

33. Points out that delays to Member States' ratification of EU IIAs delay the replacement of bilateral investment treaties (BITs) with more transparent and modern provisions that protect equally all EU investors in third countries; calls on the Member States to ratify the concluded EU investment agreements; calls for the EU to work jointly with partner countries to continuously review and improve its IIAs, once they enter into force, along the lines developed in this report; expects the Member States to ensure the consistency of the IIAs with EU values and objectives;

### ***Compensation***

34. Points out that DCF methodologies, generally used for calculating compensation in IIAs, are not a reliable valuation method for investment projects that are at an early stage or those with uncertain future income streams; underlines that the use of such methods by arbitration panels represents a significant departure from well-established compensation principles and practices in national and international legal systems outside IIAs, which provide for significantly more constrained margins of discretion for adjudication; underlines that the considerable damages awarded by investment tribunals have imposed a significant and increasing 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 assess in depth and provide for corrective and transparency oriented rules and safeguards in relation to the provisions governing compensation in EU IIAs, including the use of stronger clauses preventing the use of punitive damages; calls for compensation to be capped at the level of sunk costs, reflecting the amount of eligible expenditure actually incurred by the investors; underlines that balancing approaches should, as appropriate, determine compensation awards below this cap, taking into consideration contextual elements such as non-compliance by undertakings with their legal or contractual obligations or commitments;
35. Notes 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; takes note of progress to make third-party funding for investor-state disputes more transparent; welcomes in that respect the efforts made by the Commission in recent EU IIAs; calls on the Commission to support additional provisions regulating third party funding for investor-state disputes in the context of international negotiations, so as to strictly limit this practice, which encourages abusively large awards;

### ***Bilateral investment treaties***

36. Draws attention to the thousands of existing Member State BITs which still protect fossil fuel investments, contain outdated provisions contrary to EU objectives and values, including overly broad protection standards, weak requirements on transparency and ISDS, and are not in line with the EU proposal for an MIC; calls, therefore, on the

Member States to terminate or modernise their BITs so as to put them in conformity with a reformed model of EU IIAs, and in line with this report;

37. Calls on the Commission to ensure that all of the Member States' BITs are fully compatible with EU law and are consistent with the EU's objectives and values; supports the Commission in applying in a strict manner the conditions for authorising the negotiation, signature and conclusion by Member States of new agreements, in line with a modernised EU investment policy and the judgments of the Court of Justice of the EU; recalls the obligation of the Member States to amend their BITs in conformity with Article 351 TFEU; asks the Commission to monitor compliance with these obligations and to regularly inform Parliament about progress achieved; encourages the Commission to open infringement procedures when necessary to ensure the compliance of Member States' BITs with EU law;
38. Supports the Commission in developing interpretative guidelines to be followed by the Member States along the lines of the substantive and procedural reforms referred to in this report, in order to ensure a unified interpretation of a modernised EU investment policy and guarantee full compatibility with the European Green Deal objectives; calls on the Commission to use this updated model as a basis for the authorisation of new Member State BITs;

### ***The Energy Charter Treaty (ECT)***

39. Points out that the ECT is the most litigated investment agreement in the world today; supports the efforts to modernise the ECT and the EU's position to exclude protection for most fossil fuel investments; believes, however, that the EU position should not grant protection to investments in economic activities considered to be 'significantly harmful' according to EU law, and that the timeframe for phasing out the protection of existing investments in fossil fuels should be significantly shortened in order not to undermine the achievement of the EU's climate objectives; demands an end to investor-state dispute settlement in the ECT; underlines that amending the ECT requires unanimity of all contracting parties voting at the annual conference; is concerned that Parliament does not have the same level of access to the negotiating texts of the ECT modernisation negotiations as it has had during the negotiation of other treaties;
40. Is concerned that many contracting parties seem not to share EU ambitions in the field of climate change mitigation, sustainable development and energy transition, despite the fact that all of them are also signatories of the Paris Agreement; urges the Commission to ensure the alignment of the ECT with the Paris Agreement and the objectives of the European Green Deal, while preserving the EU's ability to develop public policy measures consistent with its commitment to become the first climate neutral continent by 2050;
41. Takes note of the fact that Italy notified its decision to withdraw from the ECT as of 1 January 2015; notes that countries that have ratified or acceded to the ECT may terminate their membership 12 months after notification of withdrawal; regrets that investments realised before the exit date are still protected for 20 years, but welcomes the fact that protection ends immediately for all new investments;
42. Urges the Commission to ensure that a revised ECT protects the right of states to regulate, is in line with EU law and EU investment policy, that it immediately prohibits

fossil fuel investors from suing contracting parties for pursuing policies to phase out fossil fuels in line with their commitments under the Paris Agreement, and that investment protection is only granted to real investors and not to purely financial or speculative investors; calls on the Commission to publish its legal study analysing the potential effects of withdrawal; calls on the Commission and Member States to start preparing a coordinated exit from the ECT, and an agreement excluding the application of the sunset clause between willing contracting parties with a view to formal submission to the Council and to Parliament in the event of the abovementioned negotiating objectives not being achieved by June 2022;

43. Welcomes the Court of Justice's clarification in its *Komstroy* ruling that ISDS provisions in the ECT are not applicable in the case of intra-EU disputes; notes that at least 73 intra-EU cases are currently ongoing, including more than 40 intra-EU ECT-based investment arbitration cases; notes with great concern that the *Achmea* ruling did not deter arbitration tribunals from continuing to hear intra-EU investment disputes; urges the Commission to make its best efforts to assert these judgments in the ongoing intra-EU arbitration proceedings; asks the Member States and the Commission, therefore, to adopt an *inter se* agreement on the non-applicability of the ECT to intra-EU disputes; supports the request from several Member States for a new ruling from the Court of Justice, and considers that it should offer definitive clarification on the issue, to prevent any future intra-EU arbitration being admissible under the ECT;
44. Points out that, while it will be difficult to enforce any possible awards in intra-EU cases in EU courts, cases under the rules of the International Centre for Settlement of Investment Disputes can still be enforced in the courts of third countries; notes that these courts can order state<sup>1</sup> assets of the EU or of EU Member States to be seized;
45. Underlines that respect for the rulings of EU courts, and especially of the Court of Justice of the EU, should be taken into consideration during the selection process for arbitrators for future ICS rosters;

#### ***Multilateral efforts to reform investment protection (MIC)***

46. 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 continue constructively engaging in the UNCITRAL discussions, as well as to encourage negotiations on topics such as regulatory chill, exhaustion of remedies, the rights of third parties and damages, which have received limited attention, and to take them into account in future EU IIAs; calls on the Commission to strengthen its work in UNCITRAL in order to protect the state's ability to regulate, and ensure full transparency;
47. Supports the ongoing negotiations in UNCITRAL Working Group III in which the EU and its Member States are pursuing the establishment of a standing mechanism to resolve investment disputes: the multilateral investment court (MIC); welcomes the global leadership the EU is providing in these negotiations; stresses, however, that this proposal does not cover the modernisation of substantive protection standards; calls on

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<sup>1</sup> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the 'New York Arbitration Convention'.

the Commission to ensure that the body of law that judges from the MIC apply balances the interpretation of substantive provisions and rights enshrined in IIAs with relevant domestic public interest laws which have been enacted democratically; asks the Commission to ensure that judges are not paid on a case-by-case basis; calls on the Commission to promote the reform and modernisation of these standards in appropriate international forums;

48. Calls on the Commission to include in the negotiations on the MIC the introduction of rules setting out, in a transparent manner, the compensation to be paid by states, and to advocate for strict valuation methods that only permit compensation of sunk costs in the ongoing UNCITRAL reform negotiations;
49. Strongly criticises the significant delay in the ratification and implementation of the Mauritius Convention; calls on the Member States to adopt without delay the proposal for a Council decision for its conclusion on behalf of the EU; points out the recent rulings of the Court of Justice on exclusive and shared competences in relation to international treaty ratification, which may offer guidance on unblocking the ratification of this Convention;

#### ***An EU investment policy beyond investor-state adjudication***

50. Notes that, on a global scale in 2017, 2019 and 2020, more investment treaties were terminated than new IIAs concluded; underlines that most recently concluded mega-regional IIAs employ an increasingly cautious approach to investor-state adjudication;
51. Calls for EU support to strengthen domestic legal systems and the rule of law in partner countries by means of EU-level technical assistance, which would ensure a favourable environment for foreign investment while addressing systemic failures that have a negative impact on sustainable development in these countries;
52. Urges the Commission to develop an EU foreign investment strategy to incentivise and protect sustainable investments, in all their dimensions, without necessarily relying on investor-state adjudication, as well as to update its investment protection model adopted in 2015 in line with the requests of this resolution, to provide a guide for the negotiation of new or updated EU agreements;
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53. Instructs its President to forward this resolution to the Council, the Commission, and the governments and parliaments of the Member States.