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# REPORT

on the future European international investment policy  
(2010/2203(INI))

Committee on International Trade

Rapporteur: Kader Arif

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*United in diversity*

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## MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

### 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<sup>1</sup>,
  - 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,

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<sup>1</sup> [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/117328.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/117328.pdf)

- 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 Union<sup>1</sup> 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

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

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;

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.

## EXPLANATORY STATEMENT

According to Articles 206 and 207 TFEU, foreign direct investment (FDI) is an exclusive competence of the EU. This development, which has significant consequences, throws up a double challenge both for managing the more than 1 200 bilateral investment treaties (BIT) already concluded by the Member States (MS) and to define a future European investment policy which meets the expectations of investors and beneficiary states, while at the same time respecting the objectives of the EU's external action.

Specifying this future policy, which will be integrated in the common trade policy, firstly involves an analysis of investment policies conducted so far.

**At bilateral level**, nearly 3 000 BITs have been signed since 1959. Concluded mainly between developed and developing countries with the aim of ensuring legal and financial protection to investors from the former, these are based on three priorities: non-discrimination, protection of investors and their investments, and the existence of a legal mechanism ensuring compliance with these principles, through international arbitration. When, however, the first suits were filed in the 1990s, a number of problems became clear, particularly concerning the possibility of conflict between private interests and the regulatory tasks of public authorities.

**At multilateral or plurilateral level**, investment negotiations broke down at OECD level when, in 1998, discussions on an international investment agreement (IIA) ran up against the question of protecting the public intervention domain, which was in danger of no longer being able to intervene independently of private interests. The negotiations restarted at the WTO in 2004 but were again interrupted by complaints from developing countries, on the same grounds. These past events must be borne in mind at every stage of the definition of the future European investment policy.

### (1) Definitions and scope

Articles 206 and 207 TFEU mention only FDI as an exclusive competence of the EU. It is defined in judgments of the European Court of Justice 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. This definition is in line with those of the IMF and the OECD, and is opposed, in particular, to portfolio investments, debt obligations on the part of enterprises and intellectual property rights.

It is of the opinion of the rapporteur that not all kinds of investments require the same high level of protection, and that for example short-term speculative investments do not deserve the same level of protection as long-lasting investments. The rapporteur therefore recommends that the scope of future European agreements is limited to FDI only.

If the MS choose to give the Commission a mandate to negotiate on a broad range of investments, this creates a risk of important European concessions in the field of investments, since the EU's extremely open economy leaves few other levers in international trade negotiations. The Commission and MS should also keep in mind that mixed agreements will

have to be ratified by all national parliaments and will therefore give rise to wide-ranging public debate.

Finally, a number of MS have used broad definitions, with a simple postal address deemed sufficient to determine the nationality of an enterprise. This has enabled some enterprises to bypass the national legal mechanisms of their own countries: by using their branches or investors abroad, they have been able to file suits against their own countries by means of a BIT signed by a third country. Investors have also exploited this technique to select the BITs most conducive to filing a complaint. Such practices must clearly not be permitted.

## **(2) Investor protection**

Investor protection remains the first priority of investment agreements. In its conclusions on the communication, the Council stresses that the new European framework must not have a negative impact on investor protection or the guarantees which they currently enjoy. Such a restrictive criterion can become a real obstacle, making it impossible for the Commission to sign an agreement which is acceptable to the MS. The need to identify best practices, to which the Council's conclusions also point, seems to be a more sensible and more effective option, as it enables the identification of principles to develop a consistent European investment policy.

The Commission distinguishes between guarantees of protection which are relative (non-discrimination) and those which are absolute (equal and fair treatment, compensation in the event of expropriation). In the case of principles of non-discrimination, it should be noted that shifting the competence to European level should allow for greater coherence and for more European weight in multilateral discussions on global investment governance.

When negotiating market access with its main developed trading partners, it will also be necessary to guarantee reciprocity, while bearing in mind the need to exclude sensitive sectors and to maintain asymmetry in the EU's trading relations with developing countries.

## **(3) Protecting the public domain**

The question of protecting the public intervention domain will be key in determining the EU's future investment policy. The emergence of new countries as local or global powers and with strong investment capacity changes the classic view whereby the only investors were developed countries, and the EU shall have in mind that it also needs to protect itself against potentially aggressive foreign investment.

Indeed, an increased number of cases have led to a state being found guilty of indirect expropriation because of the adoption of a new legislation. Several instances are worthy of mention, in particular that involving Argentina, which was accused by three enterprises of having frozen the price paid by consumers for water following the 2001 economic crisis. In July 2010, an ICSID decision made it clear that the Argentine government had violated the principle of 'fair and equitable treatment'. The government's explanation of 'necessity' was not accepted by the arbitrators.

The USA and Canada, which were among the first states to suffer as a result of excessively vague wording in the NAFTA agreement, have adapted their BIT model in order to restrict the breadth of interpretation by the judiciary and ensure better protection of their public

intervention domain. The EU should therefore include in all its future agreements a specific clause laying down the right of the EU and MS to regulate, inter alia, on the protection of the environment, on public health, on workers' and consumers' rights, on industrial policy and on cultural diversity.

Moreover, standards of protection should be strictly defined, in order to avoid abusive interpretations by international investors. In particular:

- non-discrimination (national treatment, most favoured nation) should give a base for comparison between foreign and national investors by specifying the need to operate in 'similar conditions',
- fair and equitable treatment must be defined on the basis of the level of treatment established by international customary law,
- protection against expropriation should give a clear, fair balance between the various public and private interests.

Besides, the so-called 'umbrella clause', which enables integration into the scope of a BIT of all private-law contracts concluded between an investor and the signatory state of the BIT, should be excluded from future agreements.

Finally, the Commission and MS shall set up a list of sectors excluded by future agreements: for example, sectors which are strategically important for national defence and sensitive sectors such as culture and education. Europe must also be aware of the concerns of its developing partners and must not call for more liberalisation if they deem it necessary for their development to protect certain sectors, particularly in the area of public services.

#### **(4) Inclusion of social and environmental standards**

The EU's future policy must promote investment which is sustainable, respects the environment (particularly on the field of extractive industries) and encourages good working conditions in the enterprises subject to foreign investment. The recent reform of the OECD's guidelines to promote responsible behaviour on the part of international enterprises should be promoted by the EU. Every investment agreement should also be accompanied by a set of social and environmental standards, whether the EU negotiates a chapter on investments as part of more general negotiations on a free-trade agreement or whether it negotiates a stand-alone investment agreement.

In the first case, we should remind the EP's call for a social responsibility clause for enterprises to be included in every free-trade agreement which it signs. This must include a transparency and monitoring obligation and the opportunity for victims of a failure to comply with these provisions to take the matter to court. Concerning the environment, European policy should protect biodiversity and support technology transfer, infrastructure development and capacity-building.

In the case of stand-alone investment agreements, social and environmental standards must be included and made binding. Currently, a number of BITs have a clause which prevents the watering-down of social and environmental legislation in order to attract investment, such a clause should be included in all future agreements.

## **(5) Dispute settlement mechanism and the EU's international responsibility**

Major changes must be made to the present dispute settlement regime, which usually operates along the lines of ICSID and UNCTAD rules, in order to include several basic elements such as the need for greater transparency on cases heard in court and the judgments themselves, the possibility for parties to appeal, the obligation to exhaust local judicial remedies (where appropriate) before initiating international arbitration, the opportunity to use *amicus curiae* briefs and the obligation to select one single place of arbitration and thus avoid 'forum shopping'.

In addition, the communication mentions the possibility of introducing a system for complaints made by one state against another. European policy must be more ambitious and also enable trade unions and civil society organisations to submit cases to the courts – the only way for parties' compliance with their social and environmental commitments to be verified.

Another issue is the EU's international responsibility, in particular in financial terms: if a court ruling is made against the EU itself, who will bear the financial consequences? The Commission and MS need to address this issue as soon as possible.

## **(6) Choice of partners and powers of the EP**

The Commission has compiled a list of countries which will be privileged partners: Canada, China, India, MERCOSUR, Russia and Singapore. This choice matches two criteria: market potential and need for better protection of foreign investments.

The Commission has also stated that it does not intend to have a standard model which would be applied in identical fashion to all trade partners. Although this way of thinking is justified by the need to adapt to the particular situation of each partner, it must never lead to picking and choosing among the basic elements set out in the previous chapters.

To conclude, the rapporteur believes it is vital that the EP's standpoint on the future of investment policy be understood and taken into account by the Commission and the Council before negotiations on an investment chapter are initiated with Canada, India and Singapore, which are the first partners. This means the Commission should not submit its draft negotiating mandate to the Council until the EP has adopted its resolution. The EP must also ensure that its new powers under the Lisbon Treaty and the framework agreement between the Commission and the EP are fully respected and that, as a result, it receives 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.

8.2.2011

## **OPINION OF THE COMMITTEE ON DEVELOPMENT**

for the Committee on International Trade

on the future European international investment policy  
(2010/2203(INI))

Rapporteur: Bill Newton Dunn

### **SUGGESTIONS**

The Committee on Development calls on the Committee on International Trade, as the committee responsible, to incorporate the following suggestions in its motion for a resolution:

1. 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;
2. Notes that future EU investment policy towards developing countries needs to have a strong focus on fostering investment flows that create decent employment and reduce poverty;
3. Expresses its concern that foreign direct investment in least developed countries is extremely limited and tends to be concentrated in natural resources;
4. Stresses that fairness in investment agreements entails allowing developing countries to discriminate between different investments on the basis of their contribution to development objectives;
5. Believes also that, given healthy growth rates and the significant potential of numerous developing nations, many of which enjoy long-standing privileged relationships with Europe, the proposed improvements to investment policy, coupled with effective and efficient cooperation, could be extremely beneficial both to the EU and to developing economies;

6. Notes that the investment risk is generally higher in developing countries, and that good governance, the rule of law and transparency are the key principles for strong, effective investor protection; takes the view that increased investment in developing countries is important for development and that investment treaties can help improve governance and bring about the stable, secure environment that is needed to encourage foreign direct investment; believes, however, that this is possible in the context of an investment framework based not only on investors' rights but also on their obligations, as part of a broader partnership between the EU and developing countries for the purpose of reducing poverty, in line with MDG commitments; believes that, to this end, EU investment treaties ought to contain provisions giving the home country obligations to promote sustainable investment, transfer technology and fight corruption, and giving investors obligations in relation to compliance with human rights, labour rights and corporate social responsibility;
7. Calls on the Commission to focus more strongly on developing countries as potential investment partners; notes too that the Commission's primary concern is to design an EU investment policy that reflects the objective of achieving maximum protection for EU investors; points out, in this respect, that the Treaty on the Functioning of the European Union obliges the EU to practise policy coherence for development, i.e. to 'take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries'<sup>1</sup>;
8. Warns against developing a policy of double standards regarding the rights and obligations of corporations; calls on the Commission actively to promote corporate social and environmental responsibility (based on international standards such as the OECD Guidelines for Multinational Enterprises and the United Nations Global Compact), in order to permit effective monitoring of the impact – social, environmental and in terms of respect for human rights – of the operations of transnational undertakings and their subsidiaries in developing countries; notes the Commission's approach based on the idea that corporations' obligations should not be legally binding but should remain voluntary under a code of conduct; takes the view that corporations must be obliged to respect international and domestic law, must be held accountable where they are found to be in breach, and must publish up-to-date reports of their activities, including any lack of progress;
9. Stresses the importance of ensuring that investment treaties are consistent with all other policies affecting developing countries, and therefore that they include clauses on human rights, gender equality, the environment, decent work, transparency and the fight against illicit capital flows; accordingly, takes the view that EU agreements should improve on the model provided by existing Member State bilateral investment treaties by broadening the objectives (to include sustainable development), containing more precise provisions (especially on the definition of foreign direct investment and indirect expropriation), building in limitations (to enable control of capital movement), and adding obligations for investors and home-country governments;
10. Notes that there is a balance to be struck between the objective of promoting EU competitiveness, through market access and investment protection, and allowing

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<sup>1</sup> Treaty on the Functioning of the European Union, Article 208.

developing countries the right to regulate in order to pursue their own development agendas;

11. Underlines the need for stronger investment-promotion provisions in investment agreements when they concern developing countries;
12. Calls on the EU to meet its aid-for-trade commitments and to step up support for capacity building and good governance, focusing especially on parliaments, the judiciary, infrastructure, the strengthening of tax systems, the promotion of access to capital and microfinance, including non-profit microfinance, in developing countries, in line with the recent Commission green paper on development policy, so as to make developing countries more attractive as locations for – and help them improve their capacity to manage – foreign investment;
13. Believes that EU investment policy should take into account the differences between middle-income and low-income countries and, in particular, seek to encourage flexibility in relation to foreign investment in developing countries in activities and sectors with a clear and significant impact on sustainable development, which might otherwise not attract investment because of the risks involved; considers that 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;
14. Encourages, likewise, the transfer of new, green EU technologies to developing countries, as the best way of promoting green and sustainable growth;
15. Points out that industrial development has tremendous transformative potential for national economies and, unlike agricultural exports or natural resources extraction which expose economies to shocks, is likely to offer enhanced scope for long-term productivity growth; therefore calls on developing countries to address this issue by designing and implementing industrialisation policies with a specific focus on manufacturing specialisation and trade-capacity building;
16. Acknowledges the importance of a level playing field in investment relationships but considers, given the huge imbalances that exist between many fragile developing economies and those of EU states, that reciprocity may need to be differentiated in some cases;
17. Urges the EU to respect developing countries' ownership of their economic strategies and to cooperate with them in order to reach investment agreements that are mutually beneficial even if this means the use of a different model of BIT; stresses that these agreements must provide the necessary flexibility for developing countries to enable them to concentrate investments in the sectors most relevant for them and most capable of generating sustainable growth;
18. Stresses the added value of a coherent and integrated EU investment policy; believes that developing countries would benefit greatly from having the EU as main interlocutor on investment arrangements, rather than relying on multiple agreements with individual

Member States, provided that the EU investment policy strikes the right balance between the objective of investor protection and host states' development goals; considers it vital, therefore, to establish an appropriate deadline for the replacement of Member States' bilateral treaties by EU-level agreements; takes the view that the EU investment policy should include strong provisions on transparency, especially in relation to arbitration rules, and should oblige investors to exhaust domestic remedies first before turning to international arbitration.

## RESULT OF FINAL VOTE IN COMMITTEE

<b>Date adopted</b>	7.2.2011
<b>Result of final vote</b>	+: 24 -: 0 0: 0
<b>Members present for the final vote</b>	Thijs Berman, Nirj Deva, Leonidas Donskis, Charles Goerens, Catherine Grèze, Filip Kaczmarek, Miguel Angel Martínez Martínez, Gay Mitchell, Norbert Neuser, Bill Newton Dunn, Maurice Ponga, Birgit Schnieber-Jastram, Michèle Striffler, Eleni Theocharous, Ivo Vajgl, Iva Zanicchi
<b>Substitute(s) present for the final vote</b>	Kriton Arsenis, Agustín Díaz de Mera García Consuegra, Santiago Fisas Aixela, Emma McClarkin, Csaba Óry, Åsa Westlund
<b>Substitute(s) under Rule 187(2) present for the final vote</b>	Andres Perello Rodriguez, Teresa Riera Madurell

02.3.2011

## **OPINION OF THE COMMITTEE ON ECONOMIC AND MONETARY AFFAIRS**

for the Committee on International Trade

on the Future European international investment policy  
(2010/2203(INI))

Rapporteur: David Casa

### **SUGGESTIONS**

The Committee on Economic and Monetary Affairs calls on the Committee on International Trade, as the committee responsible, to incorporate the following suggestions in its motion for a resolution:

1. Underlines that currently there exists no conclusive definition of FDI; notes that the current investment framework is characterised by low predictability in Treaty interpretation and costly arbitration processes that are lacking in procedural safeguards; notes also that flows of capital between EU Member States and developing countries are two-directional, which should be taken into account when considering any European investment framework;
2. Acknowledges that as a result of the TFEU, foreign direct investment now falls under the exclusive competence of the EU; takes the view that Parliament must be adequately involved in the shaping of the future investment policy; 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, and that therefore, in order to reach balanced agreements with its economic partners, the EU must be encouraged, when appropriate, to negotiate with regional economic and trading areas rather than individual countries; 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, whenever possible, to encourage the promotion of the principles and objectives of the European Union; notes the intended positive move from Member State-third country BITs to EU-third country BITs and that a transitional system needs to be put in place during such a shift towards a European investment framework, until a permanent framework enters into force;

5. Notes that Member States are resolute in welcoming the replacement of existing BITs, if the new BITs are based on equal or superior terms; it should be ensured that new BITs are not inconsistent with overarching EU principles such as respect for human rights; takes the view that such BITs should be based on the 'best practices' of the Member States;
6. Notes that the negotiation of BITs is a time-consuming process;
7. Notes that dispute settlements and arbitration are time- and money-consuming and that there is a great lack of transparency in these proceedings;
8. Calls on the Commission to ensure that any transitional requirements and obligations do not place unnecessary and disproportionate burdens on Member States and do not unnecessarily prejudice their negotiating capabilities;
9. Identifies the vital importance of a legal framework marked by certainty which protects investors and their investments by means of pre- and post-investment protection, effective protection of investments, judicial protection arrangements involving international courts and effective dispute settlement systems, including for disputes between states and investors from other states; considers it important that rules also be laid down concerning liability for, and debitability of, fines levied; requires all this to be taken into account in formulating any framework so as to ensure the maximum possible certainty with regard to BITs that are already in force, as well as those that have yet to be concluded;
10. 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;
11. Notes that the traditional drafting of BITs tends to use vague wording that allows for various interpretations, and calls on the Commission to issue non-mandatory guidance as expediently as possible, e.g. in the form a template for BITs, that may be used by Member States to enhance certainty and consistency. Believes that a swift transition towards the European international investment policy will reduce uncertainty and inconsistency;
12. Notes that future EU investment treaties must strive, when possible, to promote overarching EU policy goals including those related to the protection of human rights and social and environmental standards;
13. Considers that the EU should in future prioritise 'sustainable' investment in both the environmental and the social fields, including on the basis of recent OECD rules;
14. Is in favour of the use of state-to-state dispute settlement mechanisms.

## RESULT OF FINAL VOTE IN COMMITTEE

<b>Date adopted</b>	28.2.2011
<b>Result of final vote</b>	+: 28 -: 0 0: 0
<b>Members present for the final vote</b>	Burkhard Balz, Sharon Bowles, Udo Bullmann, Nikolaos Chountis, George Sabin Cutaş, Leonardo Domenici, Derk Jan Eppink, Markus Ferber, Vicky Ford, Ildikó Gáll-Pelcz, Jean-Paul Gauzès, Sylvie Goulard, Wolf Klinz, Jürgen Klute, Rodi Kratsa-Tsagaropoulou, Philippe Lamberts, Astrid Lulling, Hans-Peter Martin, Ivari Padar, Anni Podimata, Antolín Sánchez Presedo, Edward Scicluna, Theodor Dumitru Stolojan, Kay Swinburne, Corien Wortmann-Kool
<b>Substitute(s) present for the final vote</b>	Thijs Berman, David Casa, Sari Essayah, Robert Goebbels, Carl Haglund, Gianluca Susta

## RESULT OF FINAL VOTE IN COMMITTEE

<b>Date adopted</b>	16.3.2011
<b>Result of final vote</b>	+: 20 -: 0 0: 8
<b>Members present for the final vote</b>	William (The Earl of) Dartmouth, Laima Liucija Andrikienė, Kader Arif, David Campbell Bannerman, Daniel Caspary, Christofer Fjellner, Metin Kazak, Bernd Lange, David Martin, Emilio Menéndez del Valle, Vital Moreira, Cristiana Muscardini, Godelieve Quisthoudt-Rowohl, Niccolò Rinaldi, Tokia Saïfi, Helmut Scholz, Peter Šťastný, Robert Sturdy, Gianluca Susta, Keith Taylor, Iuliu Winkler, Pablo Zalba Bidegain, Paweł Zalewski
<b>Substitute(s) present for the final vote</b>	Catherine Bearder, George Sabin Cutaş, Béla Glattfelder, Salvatore Iacolino, Syed Kamall, Elisabeth Köstinger, Miloslav Ransdorf, Carl Schlyter, Michael Theurer, Inese Vaidere, Jarosław Leszek Wałęsa