Future European international investment policy

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The European Parliament adopted a resolution on the future European international investment policy in response to the Commission communication entitled ‘Towards a comprehensive European international investment policy’.

The resolution notes that as a result of the Treaty of Lisbon, foreign direct aid (FDI) now falls under the **exclusive competence of the EU**. This new competence, 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.

Members call 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.

The Commission is urged to develop the EU’s investment strategy in a careful and coordinated manner drawing on the best practices of BITs and to provide a **strong EU template for investment agreements**. It is also called upon 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.

(1) Definitions and scope: the resolution recalls that Articles 206 and 207 TFEU do not define FDI and that the Court of Justice of the European Union 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. In this context, Members ask the Commission to provide a clear definition of the investments to be protected, including both FDI and portfolio investment. They consider, however, that speculative forms of investment, as defined by the Commission, shall not be protected.

Recalling that the standard EU Member State BIT uses a broad definition of ‘**foreign investor**’, Members ask the Commission to assess where this has led to abusive practices and to provide a **clear definition of a foreign investor**. They call 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.

(2) Investor protection: the resolution stresses that investor protection for all EU investors must remain the **first priority** of investment agreements. Members consider 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. They believe that the need to **identify best practices** is a more sensible and more effective option, enabling the development of a consistent European investment policy.

Members consider 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: (i) non-

discrimination (national treatment and most favoured nation); (ii) fair and equitable treatment, defined on the basis of the level of treatment; (iii) protection against direct and indirect expropriation.

The Commission is asked to **ensure reciprocity** when negotiating market access with its main developed trading partners and the major emerging economies.

(3) Protecting the right to regulate: the resolution stresses that future investment agreements concluded by the EU must **respect the capacity for public intervention**. The Commission is invited 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;
- 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. The Parliament should be informed about the mandate it received in each case.

(4) Inclusion of social and environmental standards: the EU's future policy must also promote investment which is sustainable, respects the environment (particularly in the area of extractive industries) and encourage good quality working conditions in the enterprises targeted by the investment. The Commission is asked to include, in all future agreements, a reference to the updated OECD Guidelines for Multinational Enterprises.

(5) Dispute settlement mechanism and EU responsibility: Members believe 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. Members request that the Commission and the Member States take up their responsibility as major international players to work towards the necessary reforms of the International Centre for Settlement of Investment Disputes (ICSID) and United Nations Commission on International Trade Law (UNCITRAL) rules.

(6) Choice of partners and powers of Parliament: the resolution 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. It 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. It 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. It 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.