Investment in an India-EU FTA

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Outline

- Global Europe and Lisbon Treaty

- What is in the new mandate
  * some general points
  * standards of treatment (8 points)

- Position of EU Parliament

- Summary and remarks
Timeline

- 2005  Deadlock after Hong Kong
- July 2006  Suspension of negotiations
- 4th Oct 2006  New strategy paper

Global Europe: competing in the world
taking a more “activist” approach to opening markets
“On investment...our developing country partners are engaged in negotiating investment bilaterally having refused to do so in DDA.

The EU would be putting itself at a disadvantage if we did not seek to improve investment conditions in our bilateral negotiations.”
Investment prior to the Lisbon Treaty

* TRIMs agreement in WTO outlaws: local content requirements and quantitative restrictions for FDI;

* EU-Chile FTA which affords the right of establishment (market access) and National Treatment to investors;


Now: EU full mandate on Foreign Direct Investment
Global Europe Strategy
9 Oct 2006 Annex

“Our potential partners such as India, ... seek a very high level of ambition as regards investment which goes well beyond the provisions of current EU FTAs.

A new, ambitious model EU investment agreement should be developed in close coordination with Member States.”
Lisbon treaty (1 Dec 2009): authority for FDI from Member States to EU

-> negotiate full investment chapter in EU-FTAs
also cover

„post establishment rights of investors“
Investment protection

-> renegotiate EU member state Bilateral Investment Treaties (BITs) with India
Investor-to-state arbitration

Investor (company) can sue government directly

Now in:

arbitration: ICSID, UNCITRAL, ...

Bilateral Investment Treaties (BITs) and Energy Treaty

Latest case: Vattenfall v. Germany

Compensation claim Euro 1.4 billion

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The Negotiation EU Mandate on Investment protection

same mandate for Canada/Singapore/India

Objective:

the highest possible level of legal protection and certainty for European investors

Increase Europe's attractiveness as a destination for foreign investment

shall cover a broad range of investors and their investments (including intellectual property rights, Portfolio investment)

whether the investment is made before or after the entry into force of the agreement.
“Without prejudice to the right of the EU and the Member States to adopt and enforce measures necessary to pursue legitimate public policy objectives such as”: 

*social, environmental, security, public health and safety, promotion and protection of cultural diversity
Dispute settlement mechanism:

State-to-state dispute settlement
Investor-to-state dispute settlement

All the sub-federal or local entities and authorities (such as provinces or municipalities) must effectively comply with the investment protection chapter of this agreement.

Both ENDS
Environment and Development Service
Standards of treatment

a) fair and equitable treatment, including a prohibition of unreasonable, arbitrary or discriminatory measures,
b) unqualified national treatment
c) unqualified most-favoured nation treatment,
d) protection against direct and indirect expropriation, including the right to prompt, adequate and effective compensation

e) full protection and security of investors and investments,
f) other effective protection provisions, such as "umbrella clause"
g) free transfer of funds of capital and payments by investors
h) rules concerning subrogation.
(b) Nation Treatment [unqualified]

“our investors must be treated at least as good as nationals of your country”

(c) Most Favorite Nation treatment [unqualified]

“If you allow an investor from another country to buy land you also have to allow our investors” (forum shopping)

right to regulate but only

“least trade distorting measures” are permitted
(e) “full protection and security of investors and investments”

compensation for damage beyond control of government

*stronger state measures against protestors?*
(g) free transfer of funds of capital and payments by investors undermines capital controls:

*balance-of-payment problems*
*volatile capital flows*
*capital flight*

*broad coverage*: *include profit, dividends, capital gains, royalties, fees and returns in kind*
(a) “fair and equitable treatment”

arbitrators are more flexible
can interpret of what is “fair and equitable”

(d) “protection against ... indirect expropriation”

e.g. Dutch BIT requests compensation for

“in future expected profits due to the loss of goodwill”
(f) “Umbrella clause”

Any right granted in a contract between a state authority and Investor is covered.

No requirement to go to national legal system.

Can require Exhaustion of national legal system.

Contract and arbitration can be secret.
*Umbrella Clause*

What can be in a contract?

**Basically everything**

Stabilization clauses:

- Guaranty No changes of law which have impact on costs or profits for an investor
- Tax law, Environmental law, Labour rights …

(exception from the law or compensation)
*Umbrella Clause*

What did the EU Parliament require?

[That] the Commission 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

EU Commission did not do so!
(h)“rules concerning subrogation”

right to transfer the Investors rights to someone else

* Export Credit Agency
* New owner of the Investor/Investment
* Liquidation Processor
* Vulture funds?
EU Parliament demands:

speculative forms of investment, as defined by the Commission, shall not be protected;

criticised “broad definition of ‘foreign' investor’;

provide a clear definition of a foreign investor”

“the right of parties to the agreement to regulate, inter alia, in the areas of [...] industrial policy”

include, in all future agreements, a reference to the updated OECD Guidelines for Multinational Enterprises.
(2) EU Parliament demands:

the need to exclude sensitive sectors and to maintain asymmetry in the EU's trading relations with developing countries.

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.

investment agreements to further benefit these countries, they should also be based on investment obligations in terms of compliance with human rights and anti-corruption standards.
Work of EU CSOs on EU Investment mandate

prevent that new EU Investment rules are worse than EU BITs

use EU process to also rise awareness of EU-BITs

change EU investment rules
Thank You

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Intellectual property (IPR) is treated in some EU-BITs as an Investment which is covered by Investor to state arbitration.

Risk? : Investor to state arbitration as enforcement mechanism for IPR.
Services

Services **Mode 3** (provision of services via a local presents) strong link to regulations on Investment.

**Example:** Bank wants to open a local office, Mergers and acquisition of service companies.

**What is the link with GATS Art.V?**

Substantial coverage [sectors, volume, modes] elimination of essentially all discrimination only “flexibility” for developing countries
Public procurement

Some sectors are only financed through government procurement (GP):

- Infrastructure e.g. Roads
- Energy: Dams, power plants, grid
- Water and sanitation ...

GP Rules <-> Investment Rules

e.g.: Power Purchasing Agreements
BOT-Investment
Sustainability chapter

Official objective to mitigate negative social and environmental side effects of Trade and Invested rules:

“No lowering of standards to attract FDI”

can be much broader, but not everything can be done here.

precautious approach in the other chapters is most important
Services

some general concerns

- Affordable access to general services: Water, Electricity, Banking, Health, Education, ...

- Co-existing public/private service providers

- Interferes deeply with rules and regulations

- GATS Art. V.

  Substantial coverage [sectors, volume, modes]

  elimination of essentially all discrimination

  only “flexibility” for developing countries