

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

Global Europe Strategy

9 Oct 2006 Annex

“ 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;**
- * Energy Charter Treaty **covers investment protection rights – including recourse to investor-to-state arbitration – 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

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 ?

(1) 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 objective of the rules on investment to ensure that the rules do not undermine the right of parties to the agreement to regulate in the areas of [...]

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 high standards 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