Opinion of the European Economic and Social Committee on the ‘Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions — Towards a comprehensive European international investment policy’

COM(2010) 343
(2011/C 318/25)

Rapporteur: Mr Jonathan PEEL

On 7 July 2010 the European Commission decided to consult the European Economic and Social Committee, under Article 304 of the Treaty on the Functioning of the European Union, on the

Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Towards a comprehensive European international investment policy


The Section for External Relations, which was responsible for preparing the Committee’s work on the subject, adopted its opinion on 20 June 2011.

At its 473rd plenary session, held on 13-14 July 2011 (meeting of 13 July 2011), the European Economic and Social Committee adopted the following opinion by 123 votes to 5 with 9 abstentions.

1. Conclusions and recommendations

1.1 The Committee welcomes the new EU competence in FDI and the opportunities this first step brings for stronger, more consistent investment protection between member states and third countries. An overarching framework is welcome provided it is not too restrictive. It is essential that investor security is maintained, both in the interests of EU business and developing countries. The enhanced bargaining power of exclusive EU competence should result in the EU becoming a more important actor, and enable better access to key third country markets whilst protecting investors, thereby enhancing our international competitiveness.

1.2 We particularly welcome the reassurance in the Communication that the EU’s trade and investment policy ‘has to fit with’ and be consistent with economic and other policies of the Union, including ‘protection of the environment, decent work, health and safety at work’ and Development. It is essential that EU investment policy must not cut across any of these: the Committee urges that for future or renewed EU Investment Treaties, both parties allow sufficient room for manoeuvre in these specific aspects of sustainable development. Equally, investors’ obligations towards sustainable development requirements need to be taken fully into account as they strive to underpin and maintain their overall competitiveness. Nevertheless an effective EU investment strategy has a crucial role to play in maintaining EU competitiveness at a time of rapid economic change and major shifts in relative economic power around the world.

1.3 The Committee agrees that a one-size model for investment agreements with third countries would be neither necessary nor desirable. However, EU investment agreements should result in combining an open investment environment with effective protection for EU investors and ensuring operational flexibility in the countries in which they are investing. Such an environment is essential if investors are to benefit, with the progressive abolition of restrictions on investment, and sufficient protection notably by including provisions on national treatment, fair and equitable treatment and free transfer of funds.

1.4 We note too that any attempt to terminate all existing Member State Bilateral Investment Treaties (‘BITs’) within five years would have a huge immediate destabilising effect on existing investments as well as on employment and social protection, although that should not preclude looking at these closely as part of any review to ensure a more coherent, transparent and balanced EU approach in the future.

1.5 To this end, the Committee urges that the EU should seize this opportunity to improve and update the investment agreements it negotiates, building on its own strengths rather than merely imitate others. The EU needs to take a critical look at recent developments in international investment law, as well as in investment policy and practice (including investor-state arbitration), to ensure that its thinking and approach to future investment treaties and investment chapters in free trade agreements is both state of the art and sustainable.

1.6 We fully support the Commission’s intention to prioritise negotiations with those countries, notably the key emerging economies as outlined in ‘Global Europe’, which have strong market potential but where foreign investors need
better protection. The Committee nevertheless welcomes the statement that this should not preclude any future multilateral initiative.

1.7 We also urge the Commission to use Investment Protection Agreements as key opportunities to encourage the kind of long-term investment in developing countries that brings economic benefits such as high quality decent work, infrastructure improvements and knowledge transfer.

1.8 The Committee regrets that the Communication does not go into sufficient detail as to how an EU international investment policy will interact and tie in with the EU Development programme, with particular reference to ACP, least developed countries and the outstanding Economic Partnership Agreement (EPA) negotiations.

1.9 Openness to two-way FDI has hitherto been of great benefit to the EU, but we regret too that the Communication is silent over possible takeovers of strategically sensitive European businesses and companies.

1.9.1 The Commission clearly and rightly intends the EU should be an open investment environment, but it needs to give further consideration as to how best to secure and monitor this. It also needs to give its attention to the complex issue of reciprocity with third parties in the field of investment, whilst avoiding any crude one-for-one exchange approach.

1.10 The Committee consider that the inclusion of investment chapters must be sought wherever possible as part of any wider EU trade negotiations and that investment must equally be included in the monitoring role foreseen for civil society where Civil Society Fora are to be set up under such agreements.

2. Background – investment: a new EU ‘frontier’

2.1 The Commission Communication Towards a comprehensive European international investment policy follows the Lisbon Treaty. Article 207 of the TFEU finally brings foreign direct investment into the EU’s common commercial policy (CCP) for the first time, whilst Art. 206 provides for the EU to work towards the ‘progressive abolition of restrictions on (international trade and) foreign direct investment’. As the Communication states, ‘Investment presents itself as a new frontier’ for the CCP, but it only marks the first step in the development of such an EU policy and responses to the Communication will be important in influencing its future direction.

2.2 The Lisbon Treaty marks a key transfer of power in terms of EU external policy; all the different aspects (trade, investment, development, enlargement) are to be more closely integrated and mutually informed - not least to ensure much greater coordination.

2.3 The purpose of this Communication is to explore ‘how the Union may develop an international investment policy that increases EU competitiveness’ contributing ‘to the objectives of smart, sustainable and inclusive growth, as set out in the Europe 2020 Strategy’, whilst maintaining an open investment environment.

2.4 The Committee however is not being asked to give its Opinion on the parallel Proposal for a Regulation that aims to establish actual transitional arrangements relating to existing BITs - a matter of considerable concern to many, although the Commission stresses it is not about to rewrite these. Member States have currently over 1 100 BITs in operation, with 147 third countries, ranging from Germany with some 120 to Ireland with none. Of the other pre-2004 Member States, only Greece and Denmark have less than 50 BITs, whereas among the newer Members, only the Czech Republic and Romania have 60 or more.

2.5 The Commission proposes to review current agreements within five years and report to Parliament and Council. Stability and legal certainty for investors has to be paramount. The Commission is however under pressure from some quarters to terminate all BITs within five years. That would have a huge immediate destabilising effect on existing investments, which would not only have serious potential effects on employment and on the companies involved, but also on social protection and prospective pensions across Europe where pension funds are heavily invested in such companies. Nevertheless that should not prevent the EU looking at existing BITs as part of an overall review of recent developments in international investment law, in investment policy and practice and in investor-state arbitration to ensure a more coherent, transparent and sustainable EU investment policy and negotiating approach in future.

2.6 The new EU competence in FDI should bring real opportunities for stronger, more consistent investment protection between member states and third countries, as well as encouraging the kind of long-term investment in developing countries that brings economic benefits such as high quality decent work, infrastructure improvement and knowledge transfer. That could also help reduce the current strong migratory pressures facing the EU.

2.7 Investment decisions are driven by market considerations, of course, but investment is often subdivided into two aspects, ‘market access’ and ‘protection’. This Communication focuses mainly on ‘protection’ but other aspects are also addressed including openness to foreign investors, and assuring such investors that they are able to ‘operate in an open, properly and fairly regulated business environment, both within and across a host country’s borders’.
2.7.1 Investment market access is already covered by both multilateral and bilateral agreements at EU level (services form a key component of the current Doha Round negotiations). It is uncertain how far ‘Portfolio’ investments, described by the ECJ as ‘the acquisition of shares on the capital market solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking’ (1), are included in the scope of the Communication: this needs clarification as would any possible differences in treatment.

3. Foreign Direct Investment (FDI)

3.1 Foreign Direct Investment (FDI) is described in the Communication (backed by ECJ Judgments) as being ‘generally considered’ to include any ‘foreign investment which serves to establish lasting and direct links with the undertaking to which capital is made available in order to carry out an economic activity’, or ‘capital flowing from an investor based in one country to an enterprise based in another’. However there being no absolute definition gives the Commission greater flexibility as conditions may change in the future, but that could also lead to potential greater legal uncertainty: not ideal for investment. Any tighter definition of investment must strengthen not weaken investor protection, nor reduce flexibility.

3.2 Many believe that investment issues may become more important than trade, especially with regard to market access in emerging economies. FDI by EU business and industry abroad has grown exponentially in recent years – part of the gathering pace of globalisation. For most, depending on comparative costs of production, the ideal point of production is as close to the end market as possible, especially important as new markets open up, particularly in key emerging economies. This trend may be accelerated: sourcing and production can be readily switched from one country to another, as has already arisen as a result of differing national and regional levels of acceptability in the use of biotechnology.

3.2.1 Global supply and production chains too can stretch over many countries – for example a mobile phone destined for Europe may be built in China, incorporating advanced technology imported from elsewhere in East Asia. It is notable that, whilst EU imports have grown rapidly in recent years from China (nearly doubling from EUR 117bn to EUR 200bn between 2003 and 2008), the overall level of EU exports from East Asia overall has remained fairly stable in the past decade (fluctuating between 21% and 26%). Before Chinese WTO entry such parts were usually imported into the EU direct from elsewhere. Indeed more than half of China’s exports come from foreign owned companies that have invested in China - in the electronics industry this is as high as 65%.

3.3 FDI plays a key role in EU global business strategy. The Communication spells out the main reasons why. Production has also been moved to China by many EU companies (e.g. in textiles) in order to remain competitive, thereby enabling continued funding of crucial work at home, notably in R&D. In 2009, EU inward investment into China totalled EUR 5.3bn, whilst Chinese investment in the EU was only EUR 0.3bn (2). As the Communication states ‘current … research on FDI and employment shows that no measurable negative impact on aggregate employment has so far been identified in relation to outward investment’ (3), although it does admit that ‘while the aggregate balance is positive, negative effects may of course arise on a sector-specific, geographical and/or individual basis’. That is more likely to affect the lower skilled.

3.3.1 In turn major emerging economies are starting to increase their ‘relative share’ in global FDI flows, as is noted. The EU is the market leader for both inward and outward FDI – as witnessed by the purchase of EU companies (e.g. Corus, Volvo) by Indian and Chinese companies – alongside many household names, notably in cars, made by US and Japanese companies already operating in Europe.

3.3.2 This openness to two-way FDI has been of great benefit to the EU, as the Communication states, but it is silent over possible takeovers of strategically sensitive European businesses and companies. There has been media speculation as to a possible EU body with powers to review and block such foreign takeovers. For example, despite the 1989 EU ban on high-tech transfer, China has been looking to buy assets (and government bonds), notably in Member States with high debt levels, as well as acquiring cutting-edge advanced technology companies. Projections from the Bank of England show that China could account for 40% of total G20 savings by 2050, compared with just 5% for the US. Such issues are covered by the Investment Canada Act, and by the US Committee on Foreign Investment. The Commission clearly and rightly intends the EU should be an open investment environment, but it needs to give further consideration both as to how best to secure and monitor this as well as into the complex issue of reciprocity with third parties in the field of investment, whilst avoiding any mechanisms based on any crude one-for-one exchange approach.

4. Investment as part of a wider EU external policy

4.1 Building a comprehensive EU international investment policy needs to cover many aspects. Investments are driven by market considerations, but equally an open investment environment is essential if investors are to benefit, with operational flexibility and the progressive abolition of restrictions on investment, backed by sufficient protection. That should include

(1) ECJ Judgement, 28 September 2006.
(2) Commission figures.
(3) 2010 Impact of EU outward FDI, Copenhagen Economics.
provisions on national treatment, fair and equitable treatment and free transfer of funds. This is essential if trade, on which ‘our prosperity depends’ (4), is to be expanded with key third countries and other emerging economies.

4.2 Investment policy was one of the ‘Singapore Issues’, added by the EU in 1997 to the WTO agenda for the then prospective Doha Round, but later dropped as an attempted compromise at Cancun in 2003. With the need to involve developing countries, it re-emerged as a key EU objective in ‘Global Europe’, the Commission’s 2006 Trade Communication, which covers most of the EU’s current FTA negotiations. This Communication builds on that approach, and the countries and regions identified, whilst stating that this should not preclude any future multilateral initiative (5).

4.3 Canada, which has expressed an interest in including investment protection in its current economic and trade negotiations with the EU, maintains high standards of investor protection, scores highly in the World Bank ‘Ease of doing business index’ and in investment flows. However, apart from Singapore, many of the other countries identified in ‘Global Europe’ and this Communication do not. In the World Bank index, China (excluding Hong Kong) ranks 89th, Russia 120th, Brazil 129th and India 133rd out of 183. For investor protection, these countries also score poorly. Favourable regulatory environments for business here have still to be worked for. It makes sense to prioritise negotiations with such countries with strong market potential but where foreign investors need better protection.

4.3.1 Singapore and India have also requested investment protection chapters in the FTAs under negotiation with the EU. Separate ‘stand-alone’ investment agreements should as suggested be pursued with both China and Russia (6), where wider negotiations are proceeding extremely slowly. Russia is believed to be equally interested. In China clear barriers facing EU companies remain, not least over IPR, procurement and high technology. However Brazil steadfastly refuses to consider the inclusion of an investment chapter in any FTA with Mercosur, whereas, any agreement with countries like Venezuela remain impracticable.

4.4 As the LSE study (7) makes clear, exclusive competence should strengthen the EU’s role, which the Committee welcomes. It points out that since the 1990s NAFTA (N America) countries have shaped investment rules through more comprehensive agreements, indirectly to the detriment of EU investors (although some involve newer Member States). It adds that the enhanced bargaining power of a single EU policy should enable the EU to gain better access to key third country markets while protecting investors, thus enhancing Europe’s international competitiveness.

4.4.1 The Committee agrees with the LSE that the EU should seize this opportunity to update the investment agreements it negotiates. However, it should build on its own strengths rather than imitate NAFTA.

5. Social and environmental considerations in investment

5.1 Nevertheless, many fear the increased politicisation of investment negotiations that would follow, not least due to the emphasis in Article 205 of the TFEU that the CCP should be guided by the general principles of EU external action, including the promotion of democracy, the rule of law, furthering respect of human rights and contributing to sustainable economic, social and environmental development. We do not share this fear: we consider these considerations to be paramount.

5.2 Recent NAFTA BITs have included provision for protection against indirect expropriation, infrequently covered by Member States’ BITs. Without it, the danger increases that disputed matters are then left to arbitration - hardly the most satisfactory way to proceed. This will be of particular interest to the Committee over the inclusion of sustainable development provisions and other regulatory measures clearly in the public interest (8) especially where these are seen by others as a way of raising barriers.

5.3 As stated, we welcome the Communication’s reassurance that the EU’s trade and investment policy has to be consistent with other EU policies, including ‘protection of the environment, decent work, health and safety at work’ - and Development. The inclusion of investment chapters must be sought wherever possible in wider EU trade negotiations.

(4) Global Europe, quoted in CESE OJ C 211, 19.8.2008, p. 82.
(5) The Committee’s views on multilateral vs. bilateral agreements are more fully covered in CESE OJ C 211, 19.8.2008, p. 82.
(6) Trade, Growth and World Affairs, chapter 2.1.
(8) Views of the Committee related to Sustainable Impact Assessments and the EU trade policy are covered by CESE OJ C 218, 23.7.2011, p. 14.
Investment protection must equally be included in the monitoring role foreseen for civil society where Civil Society Fora (*) are to be set up under such agreements.

5.4 In its response to 'Global Europe', the Committee has already called for the inclusion of the GSP Plus standards in future EU FTAs. These include the eight core ILO Conventions and major Environmental conventions. The monitoring of these aspects must be included in the investment-related remit of each CSF to be set up, not least to minimise the possibility of the host country in any dispute using environmental or social issues unfairly. However, we note that Canada has only ratified five of these ILO Conventions, Korea four and the US just two.

5.4.1 The Committee therefore welcomes the clear commitment in the Cariforum Agreement (2008) not to lower environmental or labour standards in order to attract investment, as well as a provision on behaviour of investors (Art. 72) to maintain such standards, avoid corrupt practices and maintain liaison with local communities. Investors’ obligations towards sustainable development requirements need to be taken fully into account as they strive to underpin and maintain their overall competitiveness. Equally EU investors need to be safeguarded from their domestic competitors abroad being held to lower such standards.

6. **Investment as a tool for development?**

6.1 One critical area we consider that the Communication clearly does not go into sufficient detail is how an EU international investment policy will interact and tie in with the EU Development programme, with particular reference to the ACP and least developed countries and the outstanding Economic Partnership Agreement (EPA) negotiations. The EU’s approach to Africa is in strong contrast to that of China. In its search for new sources of raw materials and outward investment China has adopted partnerships in several African countries that concentrate on investment as business, rather than as aid for development.

6.2 The EU needs to be encouraging the kind of long-term investment in developing countries that brings economic benefits such as decent work infrastructure and knowledge transfer. It should be integral to the EPA initiative, which is primarily concerned with development.

6.2.1 The Committee (*) has previously referred to the need for Africa’s economic development ‘to depend first and foremost on deepening its internal market so that it is able to develop the type of endogenous growth that would stabilise and establish the continent in the world economy. Regional integration and internal market development are the pillars and springboards that will enable Africa to participate positively in world trade’. We reiterate this with EU investment policy.


The President
of the European Economic and Social Committee
Staffan NILSSON

(*) Provision has been made for a Civil Society Forum (CSF) in the Cariforum (EPA) and Central America (FTA) agreements to monitor the whole agreement, and that with Korea to monitor the chapter on Sustainable Development.