Opinion of the European Economic and Social Committee on the ‘Role for sustainable development and civil society involvement in stand-alone EU investment agreements with third countries’

(2015/C 268/04)

Rapporteur: Mr PEEL

At its plenary session on 10 July 2014, the European Economic and Social Committee decided, under Rule 29 (2) of its Rules of Procedure, to draw up an own-initiative opinion on:

The role for sustainable development and civil society involvement in stand-alone EU investment agreements with third countries.

The Section for External Relations, which was responsible for preparing the Committee’s work on the subject, adopted its opinion on 24 February 2015.

At its 506th plenary session, held on 18—19 March 2015 (meeting of 19 March), the European Economic and Social Committee adopted the following opinion by 165 votes to 1 with 8 abstentions.

1. **Conclusions and recommendations**

1.1. In recent years the EU has successfully negotiated a number of Free Trade Agreements (FTAs), each containing a specific chapter on sustainable development, together with a joint civil society mechanism to monitor implementation. In each instance the Committee has a key role to play. The EU is also undertaking two separate negotiations for stand-alone Investment Agreements, and more may follow. The Committee considers it essential that these agreements should also contain a sustainable development chapter with an appropriate mechanism enabling civil society involvement.

1.2. Separate stand-alone investment agreements, rather than full FTAs, will be negotiated for differing reasons as circumstances dictate, but of necessity their scope will be more limited. The requirement to include a separate sustainable development chapter in these remains compelling, but the formal inclusion of civil society involvement will demand greater effort.. In a FTA, like that with Korea, many joint Committees are set up, but an Investment Agreement will have very few.

1.2.1. Greater ingenuity to involve direct civil society input will therefore be required. This should be developed either through using an existing dialogue mechanism, such as offered by the EU-China Round Table, or through encouraging inter-sectoral dialogue including greater use of the social partners. In any event, the Committee should be included in developing possible solutions.

1.3. Part of the EU emphasis on sustainable development of course stems from its overall desire to promote and strengthen the potency of its shared beliefs in democracy, the rule of law, human rights, transparency and predictability, not least in key areas such as IPR.

1.3.1. At the heart of this lies protection of the environment, combatting climate change, promoting decent work, health and safety at work and the wide range of issues addressed both by the core ILO Conventions and the key environmental conventions. The Committee believes the time has now come to stress actual implementation in such agreements through collaborative efforts involving capacity building both in human resources and technology transfers.

1.3.2. The Joint Declaration of the 27th ACP-EU meeting in October 2014 [1] sets out clearly the Committee’s underlying principles and concerns, here shared with civil society from outside the EU. Its executive summary emphasises the importance of both sustainable development and the finalisation of the Sustainable Development Goals (SDGs) this year, together with the need to involve civil society (or non-state stakeholders) throughout such negotiations. Although set out here for Economic Partnership Agreements (EPAs), it is equally applicable to Investment Agreements.

(1) ACP EU Meeting_Oct 2014_Final Declaration-EN (2).

1.4. The Committee emphasises that any Investment Agreement reached by the EU must have full synergy with the work of the Open Working Group finalising the comprehensive set of 17 SDGs, the lead up to the Paris Conference of the Parties to the UN Framework Convention on Climate Change (UNFCCC COP 15) as well as with the current pluri-lateral negotiations to reduce tariffs on environmental (green) goods.

1.4.1. The Committee has previously stated that a better understanding is needed as to how the three dimensions of sustainable development interact 'in order to identify fair, moderate and effective solutions' ([2]). Nevertheless sustainability must play a key role in the current EU investment negotiations with China, not least as we understand that a key demand in China is for green, sustainable investment, through importing EU expertise and technology.

1.5. The Committee notes with regret that global investment levels have dropped by at least 5 % since 2000.

1.6. We also note that, especially given the Unctad ([3]) estimate that some USD 7 trillion will be needed for investment over the lifetime of the SDGs, and that at least a third of this will need to come from the private sector, the role of the private sector will be a key factor in any Investment agreement. Investment protection is a key issue, but is being covered by a separate concurrent Committee Opinion. The Committee nevertheless reaffirms that the right of the EU and other states to regulate and pursue legitimate public policy objectives (including health, safety and environment) is paramount.

1.6.1. The Committee strongly recommends that the Commission pay particular attention to supporting SMEs and more specialist companies in investment matters as elsewhere. These companies are prime instigators in innovation which is particularly important to maintain and develop sustainability; they make up 99 % of the economic fabric in the EU and also create 70-80 % of employment.

1.6.2. Government procurement will need to be covered by any investment agreement, along with public-private partnerships (PPPs), governments working alongside the private sector. The EESC policy on PPP was the subject of ECO/272 issued on 21 October 2010. Although the opinion was generally supportive of PPP, it also flagged up certain concerns, which are still very relevant. The Committee has also previously stated that PPPs 'could be an important instrument for implementing development strategies, assuming they are correctly calibrated and communicate with interested parties' ([4]). Any investment agreement must therefore enable the possibility of public investments and PPP. Both have to guarantee that the goals on sustainability are met.

1.6.3. The Committee recommends too that in the sustainable development chapter of any investment agreement the role of Corporate Social Responsibility (CSR) must also be covered, including reference to socially responsible investing, such as United Nations-supported Principles for Responsible Investment (UNPRI) ([5]). To this end, such agreements should encourage public and private financial institutions to voluntarily declare that environmental, social and governance impact data, known as 'ESG' criteria, have been factored into their analyses and responsible investment decisions. We note that a new Commission Communication on CSR is expected in early 2015, but full mutual recognition of wider international guidelines by both negotiating parties is essential. These include the OECD Guidelines for Multinational Enterprises ([6]) and the UN Guiding Principles on Business and Human Rights (UNGPs), which are in the process of implementation. The Committee stresses that any action at either EU or international level should not run counter to or jeopardise these.

([2]) OJ C 271, 19.9.2013, p. 144.
([3]) Unctad WIF Press Release, Geneva 14 October 2014.
([4]) OJ C 67, 6.3.2014, p. 1.
([5]) These issues may be covered more fully by a forthcoming Committee Information Report.
([6]) OECD Guidelines for Multinational Enterprises, 2011.

2. **Background**

2.1. Investment became an EU competency under the Lisbon Treaty as part of its common commercial policy (CCP), with the EU tasked to work towards the 'progressive abolition of restrictions on (international trade and) foreign direct investment' ([7]) (FDI). The Treaty also required that all relevant aspects of trade, investment, development, and enlargement be more closely integrated and mutually informed — not least to ensure much greater coordination.

2.2. The Commission at the time published its Communication 'Towards a comprehensive European international investment policy' ([8]). This, backed by ECJ judgments, described FDI 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'.

2.2.1. The Committee Opinion ([9]) in response stated 'We particularly welcome the reassurance … 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'.

2.3. However, the drive towards closer integration of each aspect of EU external policy did not originate at that time. In its 2006 Communication 'Global Europe', issued when progress with the WTO DDA (Doha) negotiations had effectively stalled, the Commission stated that it was essential to ensure that the benefits of trade liberalisation 'are passed on to citizens. As we pursue social justice and cohesion at home we should also seek to promote our values, including social and environmental standards and cultural diversity around the world' ([10]). In its response to this Communication, the Committee in turn called for the inclusion of a sustainable development chapter in each subsequent FTA, together with an active monitoring role for civil society ([11]).

2.4. Since then there have been a notable number of EU trade agreements in which a chapter on sustainable development has figured prominently. Starting with the EU-Korea Agreement of 2010, the first concluded EU FTA for several years, such agreements have also included the setting-up of a joint civil society mechanism to monitor the implementation of these sustainable development chapters, and these mechanisms are now starting to take effect. The EU-Korea Civil Society Forum has met regularly whilst the consultative bodies covering the EU-Central America FTA, the EU-Colombia/Peru FTA, and that for the EU-Cariforum EPA, have also started work.

2.5. In the recently signed, but not yet operational, Deep and Comprehensive FTAs with Ukraine, Georgia and Moldova, similar mechanisms exist, as they do in the EU-Canada (CETA) and EU-Singapore Agreements, and can readily be anticipated in other EU trade negotiations still in progress.

2.6. Investment in turn has formed a key part of the negotiating mandate in those negotiations starting after investment became an EU competency, including CETA and even more notably in the TTIP negotiations with the US, where the 'I' stands for Investment. The mandate agreed for the Korean and the other FTAs referred to in 2.4 above predated EU competency, but investment was later added to the mandate for Singapore, and since concluded separately.

2.7. Negotiations for a separate, stand-alone, Investment Agreement, were formally launched at the EU-China summit in November 2013, to be followed in March 2014 by the launch of negotiations for a similar agreement with Myanmar. These are the first 'stand-alone' EU investment negotiations in that they are not part of a wider FTA negotiation ([12]). This may also offer an attractive alternative route where long running EU FTA negotiations appear to have lost all momentum, whilst before the Ukrainian crisis possible separate EU investment negotiations with Russia had also been mooted.

(7) Article 206, TFEU.
(8) 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.
(9) OJ C 318, 29.10.2011, p. 150.
(10) COM(2006) 567 final, 4 October 2006, point 3.1.iii.
(11) OJ C 211, 19.8.2008, p. 82.
(12) Some wish to see full EU FTA negotiations with China.

2.8. This Opinion therefore looks at the possible role for a sustainable development chapter in such stand-alone Investment agreements, together with the scope for formal, active civil society involvement.

3. **The changing nature of investment**

3.1. Investment (as one of the 'Singapore issues' agreed in 1996) was originally due to form part of the multilateral WTO trade negotiations launched at Doha, but was subsequently dropped at the 2003 Cancun WTO Ministerial Conference. The OECD attempt to launch a Multilateral Agreement on Investment failed in 1998. The WTO Uruguay Round TRIMs (Trade-Related Investment Measures) Agreement, 20 years ago, applies only to measures that affect trade in goods, but does not include services or other key areas that have developed in the meantime.

3.2. Separation of trade and investment is becoming increasingly complex, needing an integrated approach. FDI plays a key and growing role in EU global business strategy. For many, 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 fast emerging and other developing economies. For others, the ready ability to switch sourcing and production from one country to another is important, as has already been shown due to differing degrees of acceptability in the use of biotechnology.

3.2.1. Currency movements and changing costs also affect supply chains, leading to fluctuations and short-term movements in production. High import barriers — once a positive for investment — are now also more likely to deter FDI.

3.2.2. 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. Before Chinese WTO entry these were usually imported into the EU direct. Indeed about one half of China's exports come from foreign-owned companies that have invested in China — in the electronics industry this has been as high as 65 %.

3.2.3. The 2010 Communication also pointed out that 'current ... research on FDI and employment shows that no measureable negative impact on aggregate employment has so far been identified in relation to outward investment' ([13]), although it did 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. Trade and investment practices are developing very quickly. For example, the internet is bringing about radical change with exponential growth in buying goods internationally on-line, paying for these on-line and then tracking actual shipment to make sure the goods arrive. Changes brought about by the growing use of eBay/PayPal and equivalents (such as Alibaba) will revolutionise trade and investment. ICT is already a major factor in FDI.

3.3.1. This has enormous potential for SMEs and other more specialist companies, as it will enable them and local businesses to access markets hitherto inaccessible, especially for SMEs based in remoter areas. This could provide a significant boost for SMEs investing abroad — and in creating local jobs. Since SMEs make up 99 % of the economic fabric in the EU, are key drivers of innovation, key to maintaining and developing sustainability, and create 70-80 % of employment, the EESC calls on the Commission to pay particular attention to supporting such businesses in investment matters, as elsewhere.

([13]) 2010 Impact of EU outward FDI, Copenhagen Economics.

4. **Stand-alone Investment agreements**

4.1. The two current EU 'stand-alone' investment negotiations, with China and with Myanmar, will be very different, although we understand the basic mandates are similar. With China, all EU Member States (except Ireland) have individual Bilateral Investment Treaties (BITs); with Myanmar, none do so. For China, market access issues also form a core part of the negotiations; with Myanmar, those are only about investor protection. After its long period of isolation the Myanmar government now wants to attract and encourage foreign investment.

4.2. China and Myanmar are about as far apart as possible in development terms. One is a major superpower, now embedded in the world's trading system, the other is slowly emerging from decades of imposed and self-imposed isolation. Myanmar will need capacity building: China does not. Total EU trade in goods with Myanmar in 2013 was EUR 533 million, with China it was EUR 428 billion (and services a further EUR 49,9 billion in 2012) ([14]).

4.2.1. In 2012, EU inward investment into China nevertheless only totalled EUR 15,5 billion (EUR 5,3 billion in 2009), whilst Chinese investment in the EU was just EUR 7,6 billion (EUR 0,3 billion in 2009) ([15]) — or only about 2,6 % of inward investment into the EU that year. These figures are very low, emphasised by the fact that, compared with nearly 30 % to the US, less than 2 % of the EU's FDI goes to China (although this is about 20 % of all FDI into China). In turn China accounts for less than 0,7 % of overall FDI in the EU (there may also be indirect investment through Hong Kong or elsewhere), whereas the US accounts for 21 %.

4.2.2. Each Investment Agreement negotiation will have its own characteristics. For Myanmar it will be to set down principles and standards to build and encourage foreign investment; for China a much more ambitious agreement is being sought. In each case, however, a large proportion of the investment to follow will be by or in conjunction with the private sector.

4.3. A key area of competency for parties to an investment agreement will be to facilitate investment through the provision of necessary, sustainable infrastructure. Governments are responsible for providing a firm regulatory basis for infrastructure, whether at a regional level, or for securing effective, efficient grids for energy, water and transport, through effective systematic groundwork for these. Energy and water networks and grids need complex design and may require a decade or more to be put fully into place. The regulatory environment also needs to be planned long-term. Unctad ([16]) estimates that, of the USD 7 trillion needed for investment over the lifetime of the Sustainable Development Goals, at least a third will come from the private sector — including building new cities, and provision of schools, hospitals and roads.

4.4. Facilitating public-private partnerships (PPPs) here will be essential. Any investment agreement must ensure that the regulatory environment enables inward investment into government procurement and in PPPs, backed by long-term predictability and sustainability. Companies equally need to plan long-term, especially if their investments are to succeed. Failure on either side suits nobody. Robust government and private sector players need to develop new synergies and learn new forms of engagement. There should be a key role for civil society input here too, particularly at the level of the social partners.

4.5. A major benefit for China from such a Treaty is that it will replace and update the 27 MS BITs into one agreement. Rather than merely consolidate these, the EU (as it has with Canada) must aim to achieve a high standard, new generation agreement. As well as market access, these negotiations also cover a number of wider issues, including government procurement, competition policy, the role of State-Owned Enterprises (SOEs) and access to sectors hitherto closed as well as issues relating to sustainable development.

4.5.1. It is essential that an EU-China Investment Agreement brings added value. It should bring about an increased political dialogue, as well as a higher level of integration and technological exchange.

([14]) DG Trade figures.
([15]) Commission figures.
([16]) See footnote 3.

4.5.2. The Committee notes the set of investment principles agreed by the EU and US in 2012 ([17]). These underlined 'the critical importance of creating and maintaining open and stable investment climates and policies, which contribute to sustainable economic development and growth, job creation, increased productivity, technological innovation, and competitiveness'.

4.6. However, the overarching need for a sustainable development chapter in any investment agreement with China is clear, especially as a key demand in China is for green, sustainable investment. Most observers see as a major reason for Chinese interest in such an agreement their need for EU investment and technical know-how in helping expand existing cities whilst ensuring maximum sustainability, and in building new sustainable cities across China. China has seen the mistakes not only in the developed world, where inner cities have been a by-word for dereliction, but also the sprawl created by very fast, unplanned, uncontrolled growth of cities, notably in fast emerging economies. The growth of urbanisation in China is exponential: already over 50 % of Chinese live in cities — a level unthinkable only a few years ago. For example, Shenzhen, a city that did not exist 40 years ago, quadrupled its population to over 10 million people in the decade to 2010. The Chinese are determined to avoid as many of the pitfalls found elsewhere as possible.

5. **The role of sustainable development in investment negotiations**

5.1. The Committee welcomes the Commission commitment to a 'sustainable development' element in investment agreements. Any specific sustainable development chapter will be based on the principles set out in the first such chapter, Chapter 13 of the EU-Republic of Korea FTA of 2010 ([18]), and as subsequently developed, notably in recent EPAs and in the Agreements with Singapore and Canada (as yet unratified). Specific adaptation for investment will also be needed, not least to include emphasis on responsible investment, greater transparency, energy efficiency, promotion of environmental services and other relevant factors.

5.1.1. The Committee also welcomes the commitments made by both the European Commission and Council to ensure that investment policy does not cut across any of the specific aspects of sustainable development.

5.2. Annex 13 of the EU-Korea Agreement makes it clear that, to achieve the objectives of the sustainable development chapter, the parties will cooperate both on an exchange of views on 'the positive and negative impacts' of the agreement as well as cooperate 'in international fora responsible for social or environmental aspects of trade and sustainable development', including the WTO, ILO, UNEP and multilateral environmental agreements. Any update of this should also include recent relevant World Bank, FAO and other initiatives.

5.2.1. Article 13.4 of that Agreement makes clear that all the key social conventions (multilateral labour standards and agreements) are covered, and Article 13.5 the multilateral environmental agreements. Article 13.6 specifically refers to FDI in 'environmental goods and services, including environmental technologies, sustainable renewable energy, energy efficient products and services and eco-labelled goods'.

5.2.2. Also of major importance are Articles 13.7, preventing any weakening or reduction in laws to encourage investment, and Article 13.9, dealing with transparency.

5.2.3. Even though each agreement negotiated will have its specific footprint, a consistent approach with a readily recognisable and acceptable format is essential.

5.2.4. A formal sustainable development dialogue mechanism similar to that provided by Chapter 13/Annex 13 of the Korea Agreement will be as important as in a full FTA. In the case of Myanmar, the ability to discuss implementation of ILO Conventions will be critical: between 1997 and 2013 Myanmar was suspended from the EU GSP/EBA scheme due to violations of the principles of the ILO convention on forced labour.

5.2.5. With China a sustainable development chapter and specific discussion forum should look to build on both the existing EU-China dialogue on employment and social policy and the EU-China Environmental Policy Dialogue, developing since 2005 but most recently through the 2012 Joint statement on enhanced Environmental Policy Dialogue and Green Growth. This should cover air and water pollution, waste management and forestry.

([17]) http://trade.ec.europa.eu/doclib/html/149331.htm
([18]) OJ L 127, 14.5.2011, p. 62.

5.2.6. Any sustainable development chapter will need to look closely at the enhanced role played by the private sector in investment. Investor obligation will be key, balanced by a fully adequate form of investor protection. Investors' obligations towards sustainable development requirements, including socially responsible investing, must be taken into account as they strive to underpin and maintain their overall competitiveness. Some will have support for sustainable development as their primary investment purpose, but for others this will be tangential. The negotiating parties need to facilitate investment, but they cannot dictate what investment is made. 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, especially investment by more specialist companies and SMEs, prime sources of innovation.

5.2.7. Article 13.6.2 of the Korea Agreement refers to fair and ethical trade with regard to trade in goods, and also to schemes 'involving corporate social responsibility and accountability'. Annex 13 also provides for 'exchange of information and cooperation' on these points, including 'the effective implementation and follow-up of internationally agreed guidelines'. The Committee strongly recommends that this approach be extended to investment agreements. The role of Corporate Social Responsibility (CSR) in any investment agreement will be critically important.

5.2.8. Such a mechanism would be very valuable in addressing CSR issues together with our investment partners. It should place emphasis on cultural sensitivity, promoting transparency and an ethical approach, and combatting corruption. Incorporating consumer preferences will bring economic benefit as well as for example promote more efficient, cleaner energy. Awareness raising, exchange of good practices and constructive collaboration between companies and stakeholders are crucial, together with capacity building for SMEs, on which costs weigh disproportionally. Chinese investments abroad can fail all too easily due to a lack of full understanding of what is required of them. Facilitating a closer link between investors, societal needs and therefore consumer preferences would be a valuable service for all parties.

5.2.9. The Commission defines CSR as 'the responsibility of enterprises for their impacts on society'. CSR is business driven, consisting of voluntary initiatives over and above legal requirements. It is about creating new value through innovation. CSR covers economic, social and environmental considerations, consulting all relevant stakeholders, but above all any approach must be flexible and diverse. It cannot fit into one-size frameworks: each business has its own particular identity. CSR practices therefore vary widely but correctly used are a valuable tool to create business opportunities and improve a company's competitiveness.

5.2.10. A new Commission Communication on CSR is expected shortly; the key international guidelines referred to include the OECD Guidelines for Multinational Enterprises ([19]) and the UN Guiding Principles on Business and Human Rights (UNGPs), currently in the process of implementation. It is important that any action at either EU or international level does not run counter to or jeopardise these. It is important too to recall that whereas states have the duty to protect and fulfil human rights, companies' responsibility is to respect them.

6. **The role for civil society**

6.1. Civil society has a role in bringing government and the private sector together and to exercise both a continuing involvement and a monitoring role. However the issue of direct civil society involvement, including direct monitoring of any investment agreement, with both state and non-state stakeholders actively participating, will need different country-specific solutions based on existing levels of inter-society dialogue and understanding between the different social groups.

6.2. In the EU-Korea Agreement there are several mechanisms for dialogue between the two parties. The Civil Society Forum reports to the Trade and Sustainable Development Committee, which involves the Governments of both parties. For investment agreements only one such Committee is envisaged — it may not always be appropriate to raise investment issues at this level, especially where one party may not wish to make it a political or diplomatic issue. A new mechanism for a Civil Society Forum may have to be found.

([19]) OECD Guidelines for Multinational Enterprises, 2011.

6.3. In countries such as China or Myanmar very different, more closed perceptions exist about civil society, so the principle of involving civil society bodies in any monitoring body will also need far more persuasion. China has adopted partnerships in several African countries that concentrate on investment solely as business, rather than as aid for development. Those consultation mechanisms that exist are not readily interchangeable with those of the EU, but any growing dialogue between any appropriate bodies would be a very important adjunct to an agreement. In its turn, the EU has made social and civil dialogue a cornerstone of its social model by providing it with an institutional framework.

6.3.1. The Committee should be included in finding solutions. We therefore recommend that an extension of the principle of the EU-China Round Table, on which the Committee and the China Economic and Social Council are equally represented, or another dialogue mechanism tailored for the relevant country-specific social circumstances, should offer the best way forward.

6.3.2. Alternatively, a way forward may be found through the Commission's considerable experience of capacity building programmes in trade and trade related issues. For example, programmes with third countries' ministries to cope with the implementation of WTO rules have had a component dealing with civic society, including Employers Federations and Trades Unions, and these have collaborated with the UN bodies (e.g. ILO, Unctad, UNIDO) in delivering such programmes. The role of the social partners will also be important, not least given the large proportion of overall investment involving businesses and companies.

Brussels, 19 March 2015.

The President
of the European Economic and Social Committee
Henri MALOSSE