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EUROPEAN COMMISSION

Brussels, 7.7.2010  
COM(2010)343 final

**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**

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**Towards a comprehensive European international investment policy**

Investment presents itself as a new frontier for the common commercial policy. The Lisbon Treaty provides for the Union to contribute to the progressive abolition of restrictions on foreign direct investment. The Treaty grants the Union exclusive competence to that effect.<sup>1</sup> This Communication explores how the Union may develop an international investment policy that increases EU competitiveness and thus contributes to the objectives of smart, sustainable and inclusive growth, as set out in the Europe 2020 Strategy.<sup>2</sup> It looks at the main orientations of an EU investment policy for the future, as well as the main parameters for immediate action in this area.

In parallel to this Communication, the Commission has adopted a proposal for a Regulation that would establish transitional arrangements relating to investment agreements between Member States and third countries.<sup>3</sup> Its objective is to provide legal certainty to both EU and foreign investors operating under the terms of these agreements. The proposed Regulation and this Communication are only first steps in the development of a European international investment policy, which will be gradual and targeted and will also take into account responses to this Communication.

**1. DEFINITION, IMPACT AND RECENT TRENDS**

Foreign direct investment (FDI) is 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.<sup>4</sup> When investments take the form of a shareholding this objective presupposes that the shares enable the shareholder to participate

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<sup>1</sup> Article 206 of the Treaty on the Functioning of the European Union (TFEU) provides that by establishing a customs union in accordance with Articles 28 to 32, the Union shall contribute, in the common interest, to the progressive abolition of restrictions on international trade and foreign direct investment, and the lowering of customs and other barriers. Article 207 includes foreign direct investment as one of the areas covered by the common commercial policy of the Union. The common commercial policy is an area of exclusive competence pursuant to Article 3(1) of the TFEU.

<sup>2</sup> Commission Communication "Europe 2020: a strategy for smart, sustainable and inclusive growth" – COM(2010) 2020, 3.3.2010.

<sup>3</sup> Commission Proposal for a Regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries.

<sup>4</sup> The terms "direct investment" appeared in the Chapter on capital movements and payments of the EC Treaty and now in Articles 63-66 TFEU. In that context, they have been interpreted by the Court of Justice in light of the Nomenclature annexed to Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ L 178, 8.7.1988, p. 5-18), which in turn is largely based on widely accepted definitions of the IMF and the OECD. See e.g. Judgment of 12 December 2006, *Test Claimants in the FII Group Litigation*, Case C-446/04, ECR p. I-11753, para. 181. See also e.g. the Judgments of 24 May 2007, *Holböck*, C-157/05, ECR. p. I-4051, para. 34; 23 October 2007, *Commission/Germany*, C-112/05, ECR p. I-8995, para. 18; 18 December 2007, *Skatterverket v A*, C-101/05, para. 46; 20 May 2008, *Orange European Smallcap Fund*, C-194/06, para. 100; 14 February 2008, *Commission/Spain*, C-274/06, para. 18; and 26 March 2009, *Commission/Italy*, C-326/07, para. 35.

effectively in the management of that company or in its control.<sup>5</sup> This contrasts with foreign investments where there is no intention to influence the management and control of an undertaking. Such investments, which are often of a more short-term and sometimes speculative nature, are commonly referred to as "portfolio investments".<sup>6</sup>

Globalisation has seen a dramatic increase of capital movements, including notably of FDI. Both a cause and an effect of globalisation, FDI flows were, in 2007, the year before investment was affected by the global economic and financial turbulence, at a record high of almost EUR 1.500 billion.<sup>7</sup>

FDI represents an important source of productivity gains and plays a crucial role in establishing and organising businesses and jobs at home and abroad. Through FDI, companies build the global supply chains that are part of the modern international economy. Innovation in transportation and information technologies has in turn facilitated trade and the globalisation of business enterprise beyond the confines of large corporations. Investment and trade are today inter-dependent and complementary. Around half of world trade today takes place between affiliates of multinational enterprises, which trade intermediate goods and services.

While the relationship between FDI and economic growth and welfare is a complex one, on balance, both inward and outward investment have a positive impact on growth and employment in and outside the EU, including in developing countries. In the EU, outward investment makes a positive and significant contribution to the competitiveness of European enterprises, notably in the form of higher productivity. Contrary to a view that is sometimes voiced, a review of the current state of research on FDI and employment shows that no measurable negative impact on aggregate employment has so far been identified in relation to outward investment.<sup>8</sup> However, while the aggregate balance is positive, negative effects may of course arise on a sector-specific, geographical and/or individual basis. Conversely, the overall benefits of inward FDI into the EU are well-established, notably in relation to the role of foreign investment in creating jobs, optimising resource allocation, transferring technology and skills, increasing competition and boosting trade. This explains why our Member States, like other nations around the world, make significant efforts to attract foreign investment.

Today, the EU is both the world's leading host and source of FDI. As a "market leader", the EU benefits from its openness to the rest of the world, including in the area of investment.

While FDI stocks and flows are today still heavily concentrated among industrialised countries, emerging market economies have become increasingly active both as investors and recipients of investment, including through state-sponsored investment like Sovereign Wealth

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<sup>5</sup> See e.g. Judgments of 12 December 2006, *Test Claimants in the FII Group Litigation*, Case C-446/04, ECR p. I-11753, para. 182; of 24 May 2007, *Holböck*, C-157/05, ECR p. I-4051, para. 35; 23 October 2007, *Commission/Germany*, C-112/05, ECR p. I-8995, para. 18; 20 May 2008, *Orange European Smallcap Fund*, C-194/06, para. 101; and 26 March 2009, *Commission/Italy*, C-326/07, para. 35.

<sup>6</sup> The Court of Justice of the European Union has described the notion of "portfolio investment" 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". See Judgment of 26 September 2008, *Commission/Netherlands*, Joined Cases C-282/4 and C-283/04, ECR p. I-9141, para. 19.

<sup>7</sup> 2009 World Investment Report of the United Nations Conference on Trade and Development (UNCTAD).

<sup>8</sup> 2010 Impact of EU outward FDI, Copenhagen Economics.

Funds, which hold not only more assets but have also more diversified investment policies than before.<sup>9</sup> This trend has become more visible during the current period of turbulence in the world economy when investments to and from emerging economies have either surged or dropped less dramatically than flows between industrialised countries. Overall, this has translated in an increase of the relative share of emerging economies in global FDI flows, both for inward and outward flows. Therefore, the EU cannot afford to take a backseat in the global competition to attract and promote investment from and to all parts of the world.

## **2. INVESTMENT AS A NEW FRONTIER FOR THE COMMON COMMERCIAL POLICY**

Investment decisions are driven primarily by market considerations, i.e. expected gains from investments. Yet, these decisions are deeply affected by the economic, political and legal environment of any given economy. Investors thrive in a stable, sound and predictable environment. A common international investment policy is not the only determinant of inward and outward FDI flows. However, it serves the fundamental purpose of assuring 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. In this respect, openness to investment should continue to serve as a touchstone to set our policies. The EU will continue to be an open investment environment, welcoming foreign investors and their contribution to the European economy and society at large. At the same time, the Union should ensure that EU investors abroad enjoy a level playing field, which assures both uniform and optimal conditions for investment through the progressive abolition of restrictions on investment. A more activist approach to ensuring that EU investment relations with third partners constitute a “two-way street” is therefore warranted. A number of important building blocks and background studies are already available, including through the extensive analytical work performed by international organisations such as OECD and UNCTAD. These lay the basis for a common international investment policy.

### ***(a) The “BITs and pieces” of investment policy***

The most visible manifestation of Member States’ policies on investment over the last 50 years is the number of so-called Bilateral Investment Treaties (BITs) that they have concluded with third countries. Germany was the first nation in the world to conclude a BIT, in 1959, and many countries around the world, including all but one Member State, have followed suit.<sup>10</sup> With a total of almost 1200 agreements that cover all forms of investment, Member States together account today for almost half of the investment agreements currently in force around the world.<sup>11</sup> An overview of the BITs entered into by the Member States is set out in the annex to this Communication.

Through BITs, Member States have sought, and obtained, from third countries specific guarantees on the treatment of their investors and investments by those third countries, for

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<sup>9</sup> The Commission has set out its approach towards Sovereign Wealth Funds in 2008. See: COM(2008) 115, 27.02.2008.

<sup>10</sup> Bilateral Investment Treaty between Germany and the Islamic Republic of Pakistan, 1959. Ireland is the only EU Member State that does not maintain any Bilateral Investment Treaty with a third country.

<sup>11</sup> 2009 World Investment Report of the United Nations Conference on Trade and Development (UNCTAD), p. 32. The UNCTAD reports a total of 2676 BITs, but this figure includes intra-EU BITs, which are BITs among EU Member States. The latter category of agreements is not covered by this Communication.

example commitments against unfair or discriminatory treatment or a guarantee of prompt, adequate and effective compensation in case of expropriation. These investment protection guarantees constitute one important element of building confidence in the legal security required for taking sound investment decisions. Hence, such investment protection agreements are considered an effective manner to promote and attract investment, in particular in countries where domestic institutions and domestic economic policies in and of themselves are not considered sufficient to confer such guarantees.

However, not all Member States have concluded such agreements, and not all agreements provide for the same high standards. This leads to an uneven playing field for EU companies investing abroad, depending on whether they are covered as a "national" under a certain Member State BIT or not.

Another feature of the agreements of Member States is that they relate to the treatment of investors "post-entry" or "post-admission" only. This implies that Member States' BITs provide no specific binding commitments regarding the conditions of entry, neither from third countries regarding outward investment by companies of our Member States, nor vice versa. Gradually, the European Union has started filling the gap of "entry" or "admission" through both multilateral and bilateral agreements at EU level covering investment market access and investment liberalisation. These have improved the conditions of market access for all EU investors, notably by ensuring the non-discriminatory treatment of investors upon entry to a third country market.<sup>12</sup>

**(b) *Towards a common international investment policy***

A comprehensive common international investment policy needs to better address investor needs from the planning to the profit stage or from the pre- to the post-admission stage. Thus, our trade policy will seek to integrate investment liberalisation and investment protection. Research confirms that substantive investment provisions in broad trade agreements impact trade and FDI flows more profoundly, or that the combination of substantive investment rules and provisions liberalising other parts of the economy jointly impact trade and investment more significantly.<sup>13</sup>

An international investment policy geared towards supporting the competitiveness of European enterprises will be best served by cooperation and by negotiations at the level of the Union.<sup>14</sup> In order to be effective, guarantees from third countries on the conditions of investment should come in the form of binding commitments under international law. Hence, investment negotiations with third countries, for which we can build on the body and substance of the more than 1100 BITs which currently exist, will enable the EU to enlarge, better define and protect the competitive space that is available to all EU investors. In the long

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<sup>12</sup> At the multilateral level, the General Agreement on Trade in Services (GATS) provides for a framework for undertaking commitments on the supply of services through a commercial presence (defined as "mode 3" by GATS Article I). At the bilateral level, the Union has concluded negotiations with Korea on a Free Trade Agreement, which includes provisions on market access for investors and establishments.

<sup>13</sup> OECD (2006), Analysis of the economic impact of investment provision in regional trade agreements, OECD Trade Policy Working Paper No. 36, 11.07.2006.

<sup>14</sup> Note that, under Article 207(2) TFEU, the Union has exclusive competence to autonomously legislate on FDI, as in the other areas of the common commercial policy, such as the import and export regulation.

run, we should achieve a situation where investors from the EU and from third countries will not need to rely on BITs entered into by one or the other Member State for an effective protection of its investments.

Investment policy is often complemented by investment promotion efforts by Member States and sub-national levels of government. Authorities engage competitively in promoting both inward and outward investment to and from their jurisdictions, just like in the area of trade or export promotion. Their efforts commonly rely on a variety of instruments, ranging from investment incentives to assistance and support schemes. While it is the Union's responsibility to promote the European model and the single market as a destination for foreign investors<sup>15</sup>, it seems neither feasible nor desirable to replace the investment promotion efforts of Member States, as long as they fit with the common commercial policy and remain consistent with EU law.

### **3. AN AGENDA FOR EU INVESTMENT NEGOTIATIONS**

As in all areas of European policy-making, the thrust of the Union's action should be to deliver better results as a Union than the results that have been or could have been obtained by Member States individually. Thus, the Union's future action in this field should be inspired and guided by the best available standards, so as to offer a level playing field of a high quality to all EU investors.

However, a one-size-fits-all model for investment agreements with 3rd countries would necessarily be neither feasible nor desirable. The Union will have to take into account each specific negotiating context. The interests of our stakeholders as well as the level of development of our partners should guide inter alia the standards the Union sets in a specific investment negotiation. In the same way, the nature of the existing agreements of Member States with any given third country need to be taken into account. While BITs recently concluded by Member States have largely a similar structure and content, there are some variations. These might equally determine the objectives to be pursued in a specific negotiating context.

The Commission submits the following broad principles and parameters for future investment agreements. These are to be developed and fleshed out in country-specific negotiating recommendations which the Commission will submit subsequent to this Communication.

#### ***(a) Criteria for the selection of partner countries***

FDI is at present heavily concentrated among developed economies. While this reflects these countries' economic importance in terms of GDP, it also underscores the generally favourable conditions for foreign investors prevailing in some of these markets. Actual trade and investment flows are in and of themselves important determinants for defining the priorities for EU investment negotiations. The Union should go where its investors would like to go, just like it should pave their way abroad, through the liberalisation of investment flows. Markets with significant economic growth or growth prospects present a particular opportunity in the current increasingly competitive environment. It is important that EU investors have access to these markets and that amid the changes that these economies might

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<sup>15</sup> Commission Communication "A single market for 21st century Europe" - COM(2007) 725

be undergoing, benefit from the availability of sufficient guarantees for fair and predictable treatment. The EU's interests in investment negotiations would also be determined inter alia by the political, institutional and economic climate of our partner countries. The 'robustness' of investor protection through either host country or international arbitration would be important determinants in defining priority countries for EU investment negotiations. In particular, the capacity and the practice of our partners in upholding the rule of law, in a manner that provides a certain and sound environment to investors, are key determinants for assessing the value of investment protection negotiations.

In the **short term**, the prospects for realising the integration of investment into the common commercial policy arise in ongoing trade negotiations, where the Union has so far only focused on market access for investors.<sup>16</sup> The latest generation of competitiveness-driven Free Trade Agreements (FTAs) is precisely inspired by the objective of unleashing the economic potential of the world's important growth markets to EU trade and investment. The Union has an interest in broadening the scope of negotiations to the complete investment area. In some cases, we could also respond to a request from our negotiating partners themselves. In the EU-**Canada** negotiations towards a Comprehensive Economic and Trade Agreement, our partner has expressed an interest in an agreement that would cover investment protection. Other ongoing negotiations in which investment protection should be considered include the EU-**India** negotiations towards a Broad-based Trade and Investment Agreement, the EU-**Singapore** negotiations towards a Free Trade Agreement, and the EU-**Mercosur** trade negotiations.

In the **short to medium term**, the Union should also consider under which circumstances it may be desirable to pursue stand-alone investment agreements. **China**, which is characterised by a high proportion of greenfield investments, including from the EU, may be one candidate for a stand-alone investment agreement, in which the protection of all kinds of assets including intellectual property rights should be covered. The Commission will explore the desirability and feasibility of such an investment agreement with China, and report to the Council and the European Parliament. **Russia** also presents particular opportunities and challenges to European investors. The negotiation with Russia of investment including investment protection should be further considered and discussed, for example in the context of a comprehensive agreement, such as the agreement that would replace the Partnership and Cooperation Agreement.

Should a comprehensive, across-the-board, investment agreement with a country, or a set of countries, prove impossible or inadvisable in the foreseeable future, sectoral agreements may be an option whose desirability, feasibility and possible impact would be further assessed. These sectoral negotiations should be based on the principles set out in this Communication and remain in line with further developments of the common investment policy. In the same vein, the feasibility of a multilateral initiative could be further considered in the long term.

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<sup>16</sup> A further legal argument for incorporating investment commitments into trade agreements relates to the fact that trade agreements, when they comply with relevant WTO rules on economic integration, are sheltered from the WTO obligation of most-favoured nation treatment, which requires WTO members to immediately and unconditionally extend the most favourable treatment to the rest of the membership. In other words, only if offered inside a trade agreement, preferential treatment, for example on investment market access, can remain preferential. This is most relevant for FDI in services sectors, given that the General Agreement on Trade in Services (GATS) addresses the supply of services through a commercial presence, which is essentially FDI.

**(b) *Looking beyond foreign direct investment***

While investors have a key interest in establishing and controlling their assets abroad, such direct investments will always give rise to additional transfers, like for example the repatriation of profits. It is important that a common international investment policy not only enables the execution of a direct investment itself – the acquisition of a foreign enterprise or the establishment of one – but also that it enables and protects all the operations that accompany that investment and make it possible in practice: payments, the protection of intangible assets such as Intellectual Property Rights, etc.

In this respect, the articulation of investment policy should be consistent with the Treaty's Chapter on capital and payments (Articles 63-66 TFEU), which provides that, in principle, all restrictions on payments and capital movements, including those involving direct as well as portfolio investments, both between Member States and between Member States and third countries, are prohibited. That chapter does not expressly provide for the possibility to conclude international agreements on investment, including portfolio investment. However, to the extent that international agreements on investment affect the scope of the common rules set by the Treaty's Chapter on capitals and payments, the exclusive Union competence to conclude agreements in this area would be implied.<sup>17</sup>

**(c) *Setting standards of investment protection***

A key question relates to the substantive rules the Union would seek to introduce in trade and investment agreements. Currently in investment negotiations, the Union relies mostly on the principle of non-discrimination, which is the cornerstone of the global trading system. Non-discrimination is usually implemented through two basic standards, 'most-favoured-nation treatment' and 'national treatment', which are both relative standards, because they involve making a comparison between the treatment provided based on origin, rather than defining an absolute standard of treatment. Consequently, their content is determined on the basis of the treatment that a country grants to its foreign investors and investments and to its own investors and investments

While non-discrimination should continue to be a key ingredient of EU investment negotiations, BITs employ other standards as well, such as "fair and equitable treatment" after admission and "full security and protection" treatment. These standards do not imply a comparison to the manner in which comparable investments are treated. Moreover, a number of Member State BITs provide for the protection of contractual rights granted by a host government to an investor ("umbrella clause"). They have been traditionally used in Member States BITs and are an important element among others that should inspire the negotiation of investment agreements at the EU level.

An important cornerstone of Member State best practices are clauses which place certain conditions upon the exercise of the host country's right to expropriate. While it follows from Article 345 TFEU that the Treaty does not affect a Member State's right to decide whether a given asset should be in public or private ownership, the Court's case law shows that this does

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<sup>17</sup> Article 3.2 of the Treaty on the Functioning of the European Union provides that "the Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope."

not have the effect of exempting expropriation measures from the fundamental rules of the Treaty, including those on freedom of establishment and free movement of capital.<sup>18</sup> Accordingly, expropriation measures in the EU should be non discriminatory<sup>19</sup> and proportionate to attain their legitimate objective (e.g. by providing for adequate compensation)<sup>20</sup>. Hence, the Union should include precise clauses covering this issue into its own future investment or trade agreements. A clear formulation of the balance between the different interests at stake, such as the protection of investors against unlawful expropriation or the right of each Party to regulate in the public interest, needs to be ensured. Likewise, EU clauses ensuring the free transfer of funds of capital and payments by investors should be included.

Finally, it should be recalled that the Union's trade and investment policy has to fit with the way the EU and its Member States regulate economic activity within the Union and across our borders. Investment agreements should be consistent with the other policies of the Union and its Member States, including policies on the protection of the environment, decent work, health and safety at work, consumer protection, cultural diversity, development policy and competition policy. Investment policy will continue to allow the Union, and the Member States to adopt and enforce measures necessary to pursue public policy objectives.

A common investment policy should also be guided by the principles and objectives of the Union's external action more generally, including the promotion of the rule of law, human rights and sustainable development (Article 205 TFEU and Article 21 TEU). In this respect, the OECD Guidelines for Multinational Enterprises, which are currently being updated, are an important instrument to help balance the rights and responsibilities of investors.

#### ***(d) Enforcing investment commitments***

Ensuring the effective enforceability of investment provisions is a key objective of the Union. The Union has increased its focus in recent years on ensuring that agreements negotiated in the field of the common commercial policy can be, and are, effectively enforced, if necessary through binding dispute settlement. The Union has included in all of its recent FTAs, an effective and expedient state-to-state dispute settlement system. This dispute settlement system will, in the future, cover the investment provisions of EU trade and investment agreements.

In order to ensure effective enforcement, investment agreements also feature investor-to-state dispute settlement, which permits an investor to take a claim against a government directly to binding international arbitration.<sup>21</sup> Investor-state dispute settlement, which forms a key part of the inheritance that the Union receives from Member State BITs, is important as an investment involves the establishment of a long-term relationship with the host state which cannot be easily diverted to another market in the event of a problem with the investment.

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<sup>18</sup> See e.g. Judgments of 23 February 2003, C-452/01, *Ospelt* [2003] ECR I-9743, para. 24; 1 June 1999, C-302/97, *Konle* [1999] ECR I-3099, para. 38; and of 6 November 1984, *Fearon*, C-182/83, ECR [1984] p. 3677, para. 7.

<sup>19</sup> ECJ, Judgment of 6 November 1984, *Fearon*, C-182/83, ECR [1984] p. 3677.

<sup>20</sup> EFTA Court, Judgment of 26 June 2007, Case E-2/06, EFTA Surveillance Authority/Norway, para. 79; Article 17 (1) of the EU Charter of Fundamental Rights.

<sup>21</sup> The Energy Charter Treaty, to which the EU is a party, equally contains investor-state dispute settlement.

Investor-state is such an established feature of investment agreements that its absence would in fact discourage investors and make a host economy less attractive than others.

For these reasons, future EU agreements including investment protection should include investor-state dispute settlement. This raises challenges relating, in part, to the uniqueness of investor-state dispute settlement in international economic law and in part to the fact that the Union has not historically been a significant actor in this field. Current structures are to some extent ill-adapted to the advent of the Union. To take one example, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), is open to signature and ratification by states members of the World Bank or party to the Statute of the International Court of Justice. The European Union qualifies under neither.

In approaching investor-state dispute settlement mechanisms, the Union should build on Member State practices to arrive at state-of-the art investor state dispute settlement mechanisms. Among the main challenges are:

- The **transparency** of investor-state dispute settlement. In line with the EU's approach in the WTO, the EU should ensure that investor-state dispute settlement is conducted in a transparent manner (including requests for arbitration, submissions, open hearings, amicus curiae briefs and publication of awards);
- The **atomisation of disputes and interpretations**. Consistency and predictability are key issues and the use of quasi-permanent arbitrators (as in the EU's FTA practice) and/or appellate mechanisms, where there is a likelihood of many claims under a particular agreement, should be considered;
- **Rules for the conduct of arbitration**. The Commission will explore with interested parties the possibility that the European Union seek to accede to the ICSID Convention (noting that this would require amendment of the ICSID Convention).<sup>22</sup>

(e) *International responsibility*

In line with the Commission's aim to develop an international investment policy at EU level, the issue of the international responsibility between the EU and the Member States in EU investment agreements needs to be addressed. The European Union, represented by the Commission, will defend all actions of EU institutions. Given the exclusive external competence, the Commission takes the view that the European Union will also be the sole defendant regarding any measure taken by a Member State which affects investments by third country nationals or companies falling within the scope of the agreement concerned. In developing its new international investment policy, the Commission will address this issue, and in particular that of financial compensation, relying on available instruments, including, possibly, new legislation.

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<sup>22</sup> The European Communities successfully negotiated the amendment of, and subsequent accession to a number of international agreements/organisations. A recent example is the World Customs Organisation.

#### 4. CONCLUSION

The Lisbon Treaty's attribution of EU exclusive competence on FDI integrates FDI into the common commercial policy. It also allows the EU to affirm its own commitment to the open investment environment which has been so fundamental to its prosperity and to continue promoting investment, both direct investment and portfolio investment, also as a tool of economic development.

Until now, the Union and the Member States have separately built around the common objective of providing investors with legal certainty and a stable, predictable, fair and properly regulated environment in which to conduct their business. While Member States have focused on the promotion and protection of all forms of investment, the Commission elaborated a liberalisation agenda focused on market access for direct investment. In this respect, a clear and complementary division of labour in the field of investment has resulted in a rather large and atomised universe of investment agreements.

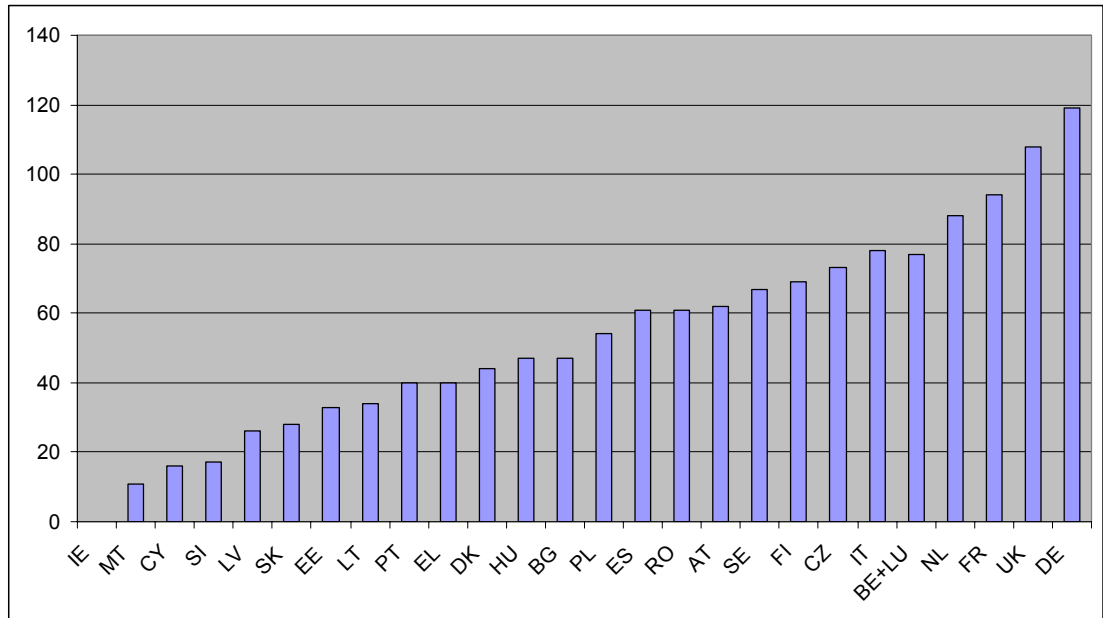
With a view to ensuring external competitiveness, uniform treatment for all EU investors and maximum leverage in negotiations, a common international investment policy should address all investment types and notably assimilate the area of investment protection. The Union should follow the available best practices to ensure that no EU investor would be worse off than they would be under Member States' BITs.

While investment protection and liberalisation become key instruments of a common international investment policy, there will remain significant scope for Member States to pursue and implement investment promotion policies that complement and fit well alongside the common international investment policy. In general, a common policy will require more, rather than less, cooperation and coordination among the Union and the Member States.

Through investment negotiations, which in principle would be conducted as part of broader trade negotiations, the EU should seek to obtain binding commitments from its partners that guarantee and protect the free flow of all forms of investment. Stand-alone investment negotiations would also remain an option. In the short term, the Commission will seek the adaptation of negotiating directives to enlarge the scope of negotiations for a number of countries with whom trade negotiations are ongoing, where strong interests exist and where requests have been formulated. While the principles and parameters for such negotiations will be inspired by 'best practices' that Member States have developed, this Communication already submits some broad contours of the scope and standards the Union should be setting through international investment negotiations.

As set out above, the proposed Regulation regarding transitional arrangements relating to investment agreements between the Member States and third countries and this Communication are only first steps in the development of a European international investment policy, which will be gradual and targeted and will also take into account responses to this Communication.

Annex: Overview of the number of Bilateral Investment Treaties concluded by Member States



Note: Information as known to the Commission services on 15 June 2010