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A stronger role for the European Parliament in the design of the EU's investment policy as a legitimacy safeguard*

by

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Since the Treaty of Lisbon and the transfer of exclusive competence over FDI from the member states to the EU, the European Commission has designed an innovative investment policy, leaving in the shadows another powerful actor whose contribution can easily be overlooked. Yet, in the post-Lisbon era, the European Parliament not only enjoys extensive powers in the formulation of the EU's investment policy, but it has also made clear that it will not hesitate to use them. Its involvement is a significant and welcome development, given that the Parliament is the EU's democratically elected institution, and an active role should be envisaged going forward.

In the post-Lisbon era, the Parliament and Council act through regulations to define the framework for the EU's investment policy. The Parliament may require that its recommendations to the Council or the Commission be taken into account. It has further acquired the right to be immediately and fully informed about investment negotiations. The Commission's negotiators regularly brief the monitoring groups of the Parliament's Committee on International Trade, and technical debriefings are held with members of the Parliament. This ensures that the two institutions are on the same page, and that the Commission can be mindful of the Parliament's wishes.

For good reason, the Commission *is* mindful of the Parliament's wishes. Since the Treaty of Lisbon, the conclusion of international investment agreements (IIAs) requires parliamentary consent, effectively investing the Parliament with a veto power over investment negotiations. Cognizant of the sway of its new power, the Parliament has voted down two international agreements,¹ demonstrating to those who had any doubt that its consent is not a mere formality to be taken for granted, but a means for it to exert leverage over negotiations. The "threat" that its consent may be declined ensures respect for its views.

A combined reading of Parliament resolutions and EU IIAs reveals this interplay of power between Parliament and Commission. An example comes from investor-state dispute settlement (ISDS). The Parliament's Resolution of April 6, 2011 stressed the need to reform the existing ISDS machinery to increase transparency and allow appeals.² The Resolution of October 9, 2013 took the view that non-litigious dispute settlement should be provided.³ The Resolution of July 8, 2015 urged the Commission to replace arbitration with a system with

publicly-appointed judges and an appellate mechanism.⁴ Subsequently, the Commission presented the two-tiered investment court system, increased transparency and added soft mechanisms.

Of course, to say that the Parliament has a meaningful role is not to say that it has the *only* role in shaping investment negotiations; for example, the Resolution of July 8, 2015 followed the Commission's own concept paper,⁵ which had already envisioned an investment court, transparent ISDS and an appellate mechanism. The concept paper itself was presented at a time when pressure was brought to bear on the Commission by member states, especially Germany, in relation to reform of ISDS and an investment court system. In reality, at the EU level, the Parliament expresses concerns and identifies risks; its inputs are broadly-worded policy suggestions. The Commission proposes ways to address these risks and has the technical expertise to elaborate concrete investment provisions. The EU's investment policy appears then as the culmination of an institutional dialogue.

That the Parliament's imprimatur attaches to the new IIAs is appropriate and should be encouraged. Investment negotiations have moved center stage in the public debate, and it is hoped that the Parliament's interest will not wane when the public debate subsides. As the Parliament continues to exercise its formal right to be informed, the specialized knowledge it gains will allow it to formulate more concise and informed policy suggestions.

Going forward, it may also be opportune to move away from the current all-or-nothing consent model to allow the EU's political institution formally to propose amendments during negotiations. Either way, the Treaty of Lisbon has given the Parliament the necessary powers to impact the content of EU IIAs and reduce the need, if any, for member state participation in the design of the EU's investment policy. In the new state of affairs, the Parliament is a player to be reckoned with; at the same time, it needs to learn how to handle its new role. This larger public role of the Parliament is desirable. The greater its involvement, as a democratically elected institution, the stronger its legitimizing effect on investment negotiations, further rationalizing the competence transfer over FDI from the member states to the EU.

An active, constructive and publicized participation of the Parliament may be key to convincing stakeholders that the design of the EU's investment policy is both legitimate and representative.

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¹In 2010, the Parliament declined its consent to the first version of the EU-US SWIFT-Terrorist Finance Tracking Program Agreement, and, in 2012, to the Anti-Counterfeiting Trade Agreement.

²Resolution of April 6, 2011 on the future European international investment policy, para. 31.

³Resolution of October 9, 2013 on the EU-China negotiations for a bilateral investment agreement, paras. 45-46.

⁴Resolution of July 8, 2015 on the negotiations for TTIP, para. 2(d)(xv).

⁵"Investment in TTIP and beyond—the path for reform," Concept Paper, 2015,

http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

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