INTEGRATING NON-TRADE OBJECTIVES IN THE ONCOMING EU INVESTMENT POLICY: WHAT POLICY OPTIONS FOR THE EU?

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Linking trade and non-commercial interests
The EU as a global role model?
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INTRODUCTION

The Lisbon Treaty

1-has broadened the EU exclusive competence over the CCP to include “foreign direct investment” (Art. 207 TFEU)

2- provides for the CCP to be conducted in the context of the principles and objectives of the EU external action (207 TFEU) and in accordance with the general provisions set forth in Articles 21-22 TEU
Pursuant to the TEU

1- protection of health, safety and environment

2- promotion of the rule of law, human rights, environment, and sustainable development
mentioned in the Commission’s Communication, *Towards a comprehensive European international investment policy*

a) the right of Parties to agreements to regulate in the public interest

- Type of regulatory interests:
  protection of health and safety at work, decent work, environment protection, consumer protection, cultural diversity, development policy, and competition policy
b) the promotion of the rule of law, human rights, environment, and sustainable development in order to balance investors’ rights and responsibilities

- reference to the OECD Guidelines for Multinational Enterprises
Listed by the EP in its Resolution of April 6, 2011

a) The right of Parties to regulate in the public interest
- Type of regulatory interest: the protection of national security, environment, public health, workers’ and consumers’ rights, industrial policy, and cultural diversity

b) Reference to the OECD Guidelines for Multinational Enterprises and to corporate social responsibility provisions
Listed by the Council in the negotiating mandates for the Chapters on investment protection in the FTAs of the EU with Canada, India, and Singapore

- The right of the EU and MSs to adopt and enforce measures necessary to pursue legitimate public policy objectives

Type of regulatory interest: social and environmental security, public health and safety, and cultural diversity
- no reference to the OECD Guidelines for Multinational Enterprises or to clauses on corporate social responsibility
poses two questions:

1) balancing investors’ rights and responsibilities in order to promote the rule of law, human rights, environment, and sustainable development
2) the safeguarding of host states’ regulatory space for regulation in the public interest
Question 1

Balancing investors’ rights and responsibilities
OPTIONS FOR THE EU AS A RULE-MAKER

A Reference to the OECD Guidelines for Multinational Enterprises
“Best endeavours” clause making reference to the Guidelines
For instance, “Each party should encourage its investors to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as standards and principles that have been endorsed or are supported by the Parties, notably the OECD Guidelines for Multinational Enterprises”
The right of the Parties to the investment agreement to regulate in the public interest will be explicitly safeguarded in the European Chapters on investment.

There are different means through which such a right could be safeguarded.
Means 1) The right of parties to the agreement to regulate could be mentioned in the Preamble, following the recent practice of the EU in trade matters.

Preamble of EU-South Korea FTA, sixth sentence

The Parties recognise their right ‘...to take measures necessary to achieve legitimate public policy objectives on the basis of the level of protection that they deem appropriate, provided that such measures do not constitute a means of unjustifiable discrimination or a disguised restriction on international trade, as reflected in this Agreement.’
Means 2) The right of the Parties to regulate in the public interest could be made the object of a specific and autonomous clause of a general character opening the Chapters

For instance, a provision worded in similar terms to the terms of Art. 7.1(4) EU-Korea FTA

“Consistent with the provisions of this Chapter, each Party retains the right to adopt and enforce measures necessary to meet legitimate policy objectives…” such as social and environmental security, public health and safety, and promotion and protection of cultural diversity.
Means 3)
Annexes to the investment agreement including interpretative notes on indirect expropriation and fair and equitable treatment standard in order to give arbitrators some guidance on the balancing between investors’ protection and the right of Parties to regulate in the public interest when they interpret and apply the absolute standards of protection
It is likely that all the means mentioned in this presentation will be included in the Chapters under negotiation at the moment.
THANK YOU FOR YOUR ATTENTION

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