



Investment rights stifle democracy

How industry misled the EU Parliament to protect the rights of foreign investors

Corporate Europe Observatory, 31 March 2011

Next week, MEPs are due to vote on a report from the Parliament's international trade committee (INTA) about Europe's international investment policy – giving guidelines for the rights of foreign investors under future EU trade deals. The vote follows fierce attempts by law firms, industry and member states to enshrine the right of foreign investors to challenge national laws that affect their profits. As a result, European member states could soon find domestic laws challenged by foreign companies – and politicians will have no powers to intervene.

The report due before the Parliament will effectively give the green light to a European Commission proposal to grant new privileges to foreign companies, allowing them to challenge policies from the local to the European level if they look like they might harm the profitability of a company's investments. The proposal threatens to take millions of Euros in legal expenses and compensation out of taxpayers' pockets and interfere with the ability of European governments to legislate in the interests of their citizens. Yet the Commission is already integrating these new corporate rights into its planned free trade agreements with India, Canada and Singapore.

At the same time, INTA is also discussing a report on the future of the over 1,200 existing investment treaties of EU member states, which give similarly sweeping rights to foreign investors.

In both cases the European People's Party (EPP) has been campaigning against any attempt to rectify the current unbalanced investment regime and impose social and environmental obligations on investors. Several EPP MEPs have tabled amendments which appear to have come from outside the Parliament, making the original draft report more investor-friendly. Among them is the Spanish MEP Pablo Zalba Bidegain, who was the fourth MEP to be caught accepting cash in return for amending laws by undercover journalists. EPP members Daniel Caspary, Godelieve Quisthoudt-Rowohl (both Germany), Christofer Fjellner (Sweden) and Emilio Menéndez del Valle from the Socialists and Democrats (Spain) have also proposed changes that are strikingly in line with industry demands.

The EPP's attack follows a misleading lobby campaign by EU member states, law firms and industry lobby groups including BusinessEurope and the European Services Forum. They have misled MEPs with claims that are either unsubstantiated or have been contradicted by evidence, and have withheld crucial information about the immense legal, budgetary and policy risks created by investment agreements.

The chance to overhaul investment policies under the Lisbon Treaty

Before the Lisbon Treaty entered into force on 1 December 2009, the Commission used trade negotiations to break down barriers for European investors abroad, abolishing all kinds of conditions and regulations in third countries. But it did not have the power to negotiate provisions to protect these investments, for example, against expropriation. This changed with the Lisbon Treaty, which grants full investment powers to the EU.

This new competence raises two questions. How will the Commission use its new powers? And what will happen to the 1,200 or so EU member states' bilateral investment treaties (BITs)? Both questions have been fiercely debated in the EU institutions over the last few months.

BITs give sweeping powers to foreign investors, including the right to bypass domestic courts and directly challenge laws in international tribunals when they look like they might harm the profitability of an investment. At the same time, BITs do not impose any obligations on corporations and cannot be used for complaints against investors violating the rights of workers, communities or causing environmental destruction.

Across the world, big business has used BITs to claim dizzying sums in compensation against democratically-made laws to protect the environment, public health or social well-being. Developing countries have been hardest hit by rulings against them, but the EU is not immune to investor lawsuits. Seventeen per cent of all known disputes have been issued against EU member states – many under a BIT with another EU country (see box 1 below for examples)¹. Globally, Poland and the Czech Republic are among the countries that have been sued most often under BITs².

China, Russia and India in a position to sue

The Commission's current proposals for investor-state dispute settlement provisions with India, Canada, Singapore and announced ones for Russia, China and the Mercosur bloc will lead to a steep increase of these kinds of cases because all 27 member states will be liable to investors from these countries. As one of the experts in the European Parliament hearing on investment in November 2010 warned: "The outward investment strategies of the Chinese government and others are no secret. There is no doubt that investors from these countries will use all tools available against European measures they disfavour – including investor-state arbitration." So, Europe "could increasingly end up defending a wide range of laws, regulations and other measures in front of arbitral tribunals"³.

The Commission's proposal – an early victory for the corporate investment lobby

The Lisbon Treaty created a formal opportunity to terminate the one-sided existing BITs – or revise them to guarantee a greater balance between public and private interests. The Treaty also opened a window of opportunity for the EU to learn from the experience of the existing investment regime, address its flaws and develop a new generation of treaties – without investor-state dispute settlement, with investor obligations, more precise and restrictive language regarding their rights and including the recognition of countries' right to regulate. Trade unions, civil society groups and numerous academics from across the world have called for such a u-turn⁴.

Box 1: Investors challenging EU governments

Eureko vs. the Slovak Republic⁵: Since 2008, the Dutch insurer Eureko has been suing Slovakia under a 1991 BIT with the Netherlands over legislation which reversed the health privatisation policies of the previous administration and required health insurers to operate on a not-for-profit basis. Eureko is claiming €100 million in compensation.

Vattenfall vs. Germany⁶: In 2009, Swedish energy multinational Vattenfall initiated litigation against the German government, seeking €1.4 billion plus interest in compensation for environmental restrictions imposed on a coal-fired power plant in the city of Hamburg. The action was taken under the European Energy Charter, which includes BIT-like investment protection provisions. The case has been settled out of court and the amount of compensation paid by the German government is unknown.

Elsewhere, countries are already moving in this direction. After negative experiences of excessive investor challenges to public policy measures under NAFTA, Canada and the US have revised their investment treaties so as to give themselves more policy space. South Africa is engaged in a thorough overhaul of its investment policy to better align it with development considerations⁷.

But the Commission opted to consolidate the status quo. In July 2010, it tabled a communication for its own future investment policy affirming that “no European investor would be worse off than he would be under Member State's Bilateral Investment Treaties”. It also published draft legislation providing for an open-ended authorisation of all existing BITs – plus negotiations on new ones – provided they don't conflict with EU law.

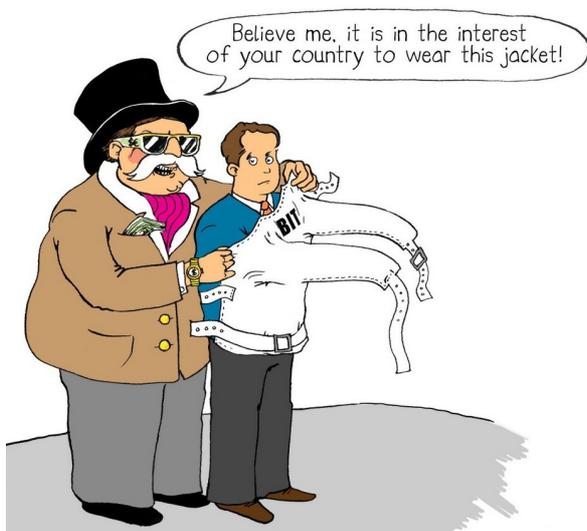
The proposal had been preceded by an intense lobby campaign from industry and EU member states. They wanted to see existing BITs integrated into EU law – ideally without any examination of their content, which could raise uncomfortable questions, for example, about the lack of environmental and labour clauses. With regards to the EU's future policy, member states and industry wanted to see “at least as many investment rights as currently provided by member state BITs”. Documents showed that they feared a “dilution” of their hard-core protection standards as a result of the involvement of the European Parliament and pressure to bring investment policy in line with wider EU goals such as environmental protection, decent work, respect for human rights and poverty eradication⁸.

According to the Swedish MEP Carl Schlyter (Greens), the Parliament's lead person for the BITs report, this united phalanx of corporate lobby groups and member states can be explained by the internalisation of big business demands by civil servants after decades of lobbying in European capitals.

He told CEO: “The existing system of international investment treaties is the result of companies asking governments to protect whatever they do. Corporate lobbyists won the battle long ago in EU member states. Now, they only had to lobby the Council to let existing treaties continue to be valid for as long as possible, with as few changes as possible and with total investor protection. EU governments have just put forward the industry position”⁹.

Lobbying the Parliament: extreme and exclusive focus on corporate interests

Once the Commission had tabled its proposals in July, member states and industry shifted their attention to the Parliament. In August, the European employers' federation BusinessEurope requested meetings with the lead MEPs on the issue, Schlyter and Kader Arif (France, Socialists



and Democrats). Numerous meetings with and briefings by member states followed. According to Schlyter, with the exception of Belgium, all member states “had a 100% industry position”. In all the dossiers he had followed as an MEP, he said, he had “never seen such an extreme and exclusive focus on corporate interests... nobody ever thought of protecting anything else but industry”¹⁰.

But apparently, the two rapporteurs did not want to be industry's willing executioners. According to an internal Commission report about a meeting with the European Services Forum (ESF) in November 2010, one of the ESF's leading figures, Richard O'Toole from Goldman Sachs complained that it was “very difficult for the

industry to meet with [the two] MEPs". He was "concerned" because "Mr Schlyter has turned down ten requests for a meeting" and Arif was "openly against" the current BITs system. Therefore, the ESF would "provide input to other MEPs to provide proper reactions, as the rapporteurs are on the negative side," he said¹¹. From then on, BusinessEurope and the ESF indeed seem to have put their energy into lobbying members of the European People's Party and the Liberals¹².

The Parliament's draft reports – aiming for a fairer investment regime

In November and December, the two rapporteurs published their draft reports¹³. They contained a range of provisions aimed at minimising the risks of future investment treaties for public budgets and legislation. And they tried to avoid the legal uncertainty of a labyrinth of overlapping and possibly conflicting BITs and EU treaties, suggesting that:

- future treaties should acknowledge the need for a fair balance between private interests and the regulatory tasks of public authorities, should mention the right to regulate, and should contain a clause to prevent the watering down of social and environmental laws to attract investment;
- the objective of future treaties should be to seek good-quality investment that makes a positive contribution to economic, social and environmental progress. They should include binding social and environmental standards and a reference to the OECD guidelines for multinational companies;
- sensitive sectors such as public services should be excluded from future agreements;
- legal concepts like 'investment', 'investor', 'non-discrimination' and 'expropriation' should be defined more precisely and narrowly to prevent overly expansive interpretations at the expense of states. Some contentious clauses should be excluded;
- there should be major changes to the current investment dispute settlement system, including more transparency, opportunities to appeal, opportunities for affected citizens and communities to participate in disputes and an obligation for a claimant to exhaust local remedies;
- EU member state BITs should be terminated after 13 years.

According to Schlyter, these proposals were intended to "give society a chance to defend other policy goals [...so] that, in the future, investment policies do not always over-ride environmental and social policies or policies against discrimination."

But that was not what member states and the business community had in mind. The proposal for an expiry date for BITs caused uproar among member states. They wanted BITs to remain in place until an EU treaty offered at least the same level of investor rights¹⁴. All through January 2011, BusinessEurope, the ESF and national industry groups such as the German industry federation BDI hammered home the same demand in seminars, breakfast debates and in behind-closed-doors meetings with MEPs¹⁵. Industry also lobbied against social and environmental standards in future EU agreements, against any warning notes about governments abandoning regulation in fear of investor claims ("regulatory chill") and against excluding certain economic sectors from the scope of future agreements¹⁶.

Law firms lobbying for vested interests

Law firms were also active in the investment lobby battle with many advising their multinational clients on "what business can do to make its voice heard"¹⁷. Law firms had been among the first to argue for keeping the status quo for corporate investor rights and against changes to existing BITs. This is not surprising – the current system is big business for them. And with the number of investor-state cases rising by at least 30-40% per year¹⁸, this business is skyrocketing.

Box 2: The vested interest of law firms

“Lawyers working for law firms often act as ad hoc arbitrators. They make a lot of money with investment arbitration and the industry is growing. So, they want to keep the system alive and profitable. Honestly, I think that law firms have the biggest interest in keeping the language of investment treaties vague – because it means more work for them. It’s when a situation is unclear that you need a lawyer. And the more treaties you have with investor-to-state provisions, the more business. The other thing is that, in a system where only investors can sue governments and not the other way round, a government friendly system would make it much less interesting for investors to bring claims. So, there is an inherent problem in that those who want to keep the system alive because they profit from it, tend to lean towards the investor. This is a clear conflict of interest.”

*Nathalie Bernasconi-Osterwalder,
senior lawyer at the International Institute on Sustainable Development (IISD)¹⁹*

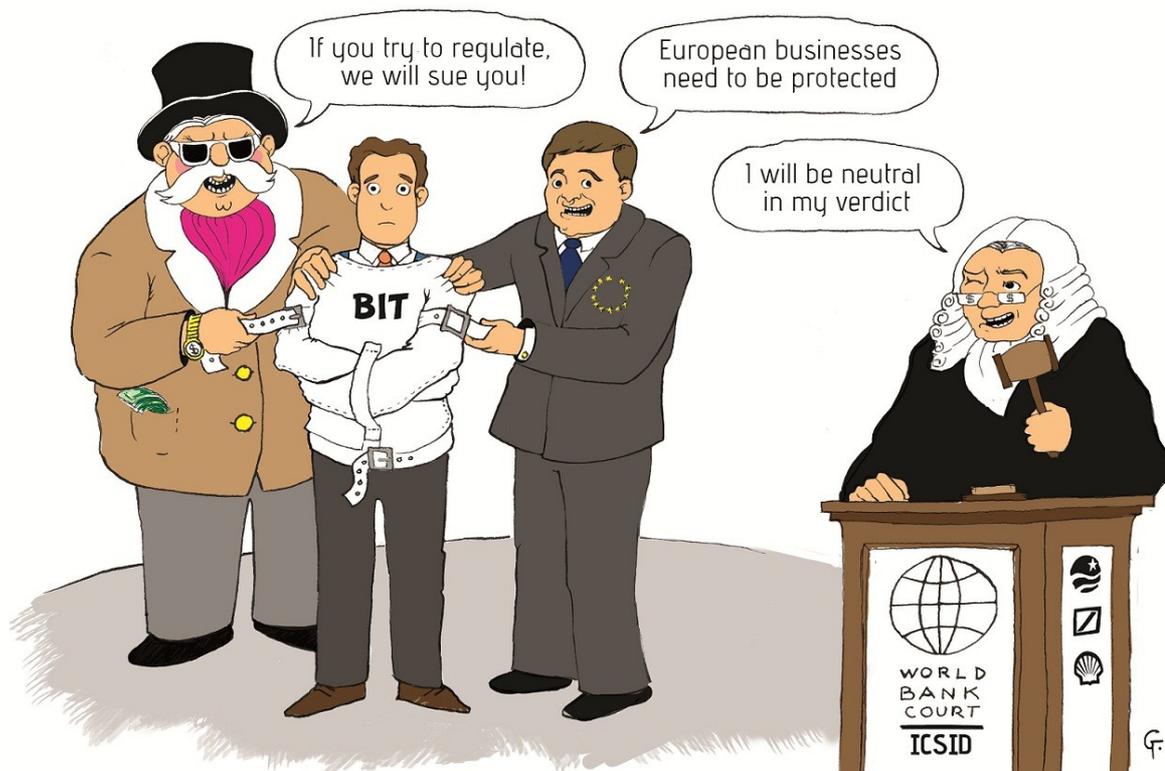
Investor-state disputes are not decided in fair processes by independent courts with judges on secure tenures scrutinised by the public. Rulings are made by highly secretive and unaccountable three-member ad hoc panels hired from a tight-knit coterie of judges and lawyers. Many of them come from law firms that also make money advising in investment disputes. So, they face a number of conflicts of interest (see box 2 above). In an internal report obtained by Corporate Europe Observatory through access to information requests, even the Commission recognised that this “community of the converted” was dominated by “vested interests” of “those that make money from investor-to-state arbitration” and do not spare a thought for “how these mechanisms resonate in political terms and with society”²⁰.

One of the main concerns put forward by law firms was the politicisation of investment policy as a result of the Lisbon Treaty. The involvement of the European Parliament was a particular thorn in their side. At a conference in December 2009, Daniel Price, an ex-US trade negotiator turned investment lawyer with Sidley & Austin, warned of the potential “steady deterioration” of BITs, which he had witnessed in the US. The involvement of Congress had led to controversy and later to a review of the US investment policy which Price considered “unhelpful”. The review tried to better balance investor and state rights through more precise legal language. In January 2010, Price wrote to the Commission official responsible for the investment files and offered “to assist you in thinking through these issues.” He added: “As you know, my group has advised both outbound investors and governments on investment policy issues”²¹.

To influence the debate in Europe, law firms like Hogan Lovells and Herbert Smith invited the Commission, member state officials and MEPs to “informal but informed” roundtable discussions and webinars with their clients – including several who have sued countries under BITs such as Deutsche Bank, Shell and energy giant GDF Suez. Their message: there was an urgent need to guarantee the legal security of existing BITs; the high standard of investor protection and in particular investor-to-state arbitration had to be maintained; and investment protection should not be linked to labour or environmental standards²².

At the end of December 2010, an arbitration blog comment about Carl Schlyter’s proposal to end existing BITs predicted that member states and the arbitration industry “will probably try to get this proposal struck down already in the INTA itself”²³. In January 2011, the Dutch law firm De Brauw Blackstone Westbroek contacted the MEPs on the INTA Committee. Two of the firm’s litigators send a scaremongering article slamming the Parliament’s draft proposals and referring to the “great concern amongst investors”²⁴. The text called on “members of the European Parliament to make fundamental changes” and proposed three “amendments”: member states’ BITs should remain in place until they were replaced by EU BITs; the Commission should only focus on new treaties with countries that have few or no BITs with EU states; and BITs between EU member states (intra-EU BITs) should be kept and extended to all EU companies because they contained even more investor rights than EU law.

BILATERAL INVESTMENT TREATIES (BITS): CORPORATE POWER RULES



What the lawyers did not mention was that their firm was representing the Dutch insurance company Eureko in its €100 million case against the Slovak government on the basis of one of these intra-EU BITS (see box 1). Their article concluded with the “good news” that “according to informal sources, criticism of the draft regulation and the draft report of the rapporteur is increasing” in the European Parliament. A couple of weeks later, MEPs from the EPP tabled De Brauw Blackstone Westbroek’s amendments, in some cases using the exact words (see annex 2).

Lobbyists mislead MEPs with distorted arguments

Several of the key arguments used by the corporate investment lobby have been unsubstantiated or are contradicted by evidence or fail to mention the significant policy and budgetary dangers of investment treaties. The crowning moment of this spin was the performance of BusinessEurope’s director for international affairs, Adrian van den Hoven, in the INTA expert hearing on investment on 8 November 2010. His speaking points²⁵ included false claims, exaggerated scaremongering scenarios and downplayed risks – lines that can be found again and again in industry contributions to the investment debate. Corporate Europe Observatory would like to propose some corrections:

Lobbyists misrepresenting the facts about the international investment regime

What the lobbyists say	What they keep to themselves
As the world’s biggest source of investment, the EU has to promote freedom of investment and strong protection for its investors.	While the EU is the market leader in outward investment, it is also the biggest recipient of investment, with high levels of foreign takeovers of European businesses. Companies from India and China want to establish a presence in Europe ²⁶ and will use all the tools available against policy-measures they dislike – including investor-state arbitration ²⁷ .

What the lobbyists say	What they keep to themselves
Investment agreements promote investment. They provide the right to invest in otherwise closed markets with weak legal protection. So, they enhance the competitiveness of the European industry.	The evidence on the link between investment treaties and investment flows is not clear ²⁸ . A number of studies cast doubt on the claim that the deals increase investment into a country. An internal EU Commission report admits that “there is no clear data” on the link ²⁹ . Some economists have argued that treaties can decrease productivity if efficient domestic producers are displaced by less efficient but politically-insured foreign firms ³⁰ .
EU member state BITs have to be maintained to guarantee ‘legal certainty’	Current EU BITs are not about legal security. There are lots of overlaps and inconsistencies between the 1,200 treaties and very vague language. The investment arbitration system is dotted with incoherent interpretations by tribunals, conflicts of interests and a lack of transparency. All this provides for legal <i>in</i> security on the side of the state and on the side of investors, because they don’t know what rights they have. Tackling these shortcomings would improve legal certainty ³¹ .
Investor-state dispute settlement provisions are essential to enforce future investment agreements	Most trade agreements do not contain investor-state dispute settlements. But they are enforced – through state-state disputes. The Australian Productivity Commission found no evidence that a system of resolving investor disputes on a state-state level had any shortcomings. The study also found “considerable policy and financial risks” arose from investor-state arbitration ³² . To bypass these risks, 50 academics from around the world have called on governments “to oppose investor-state arbitration” ³³ .
Investment treaties do not provide special rights (“VIP treatment”) to foreign investors, but only guarantee that they are “treated no less favourably than domestic industry and [...] have a basic minimum of treatment respected.”	This is not true. Investment treaties with investor-state dispute settlement provisions grant foreign investors the exclusive right to threaten and initiate claims at international tribunals that regularly impose large compensation sums on governments. This gives them a privileged position in the policy-process and in the allocation of public monies as compensation for laws that affect a wide range of constituencies. Domestic firms do not have this privilege, let alone citizens and communities ³⁴ .
Intellectual property rights (IPR) should be included in the definition of ‘investments’ to be protected by the EU’s future agreements.	The 2010 investor-state dispute Philip Morris vs. Uruguay shows the potential risks of this proposal. On the basis of a Uruguay-Switzerland BIT, the tobacco giant is suing Uruguay for its anti-smoking laws. The company argues that compulsory warning labels on cigarette packs and a ban on the sale of cigarettes branded as ‘light’ prevent it from effectively displaying its trademarks, causing a substantial loss of market share ³⁵ .
Investment treaties do not limit countries’ right to regulate. Look at the EU: EU members have the highest number of BITs, but there is not much ‘regulatory chill’ (ie governments abstaining from regulatory action for fear of triggering arbitration claims)	There is ample evidence of proposed and adopted laws for public health and environmental protection that were abandoned or watered down because investor-state claims were brought or threatened. In the Philip Morris vs. Uruguay case (above), Uruguay gave in to the pressure before arbitration began, reducing the size of health warning labels on cigarette packs. Canada also withdrew a proposal for mandatory cigarette plain-packaging after Big Tobacco threatened an investor claim. At the same time, there is no evidence against regulatory chill ³⁶ .
Linking investment agreements to environmental or social standards will increase the risk of abuse by countries pursuing unlawful expropriation policies.	This claim is unsubstantiated, but there is evidence that, as countries want to attract investors, the scenario of discrimination and expropriation is gravely exaggerated. A 2005 study based on 10,000 business respondents from 80 countries found that foreign firms enjoyed regulatory advantages over domestic ones ³⁷ .

Copy-pasting pro-industry amendments?

All of the above corporate demands and lines of argument have found their way into the amendments tabled by MEPs from the EPP: Daniel Caspary and Godelieve Quisthoudt-Rowohl (both Germany), Christofer Fjellner (Sweden), Pawel Zalewski (Poland) and Laima Liucija Andrikiene (Lithuania) (see annex 1). The group attacked the Arif report's attempts to minimise the risks of future investment treaties for public budgets and legislation with 88 amendments (out of 167 in total)³⁸. More than half of the amendments to Carl Schlyter's report (115 out of 213) came from the EPP³⁹.

There are two indicators that several of these EPP amendments have come from outside the Parliament, presumably from industry lobby groups or member states pushing industry positions. Several of the amendments feature strikingly similar wording to that found in position papers and articles from industry lobby groups and law firms (see annex 2 for the amendments proposed to MEPs by the law firm De Brauw Blackstone Westbroek). Also, a number of MEPs from different political groups and different countries have tabled identical amendments or near-identical ones.

Among them is the Spanish MEP Pablo Zalba Bidegain, who was caught agreeing to table amendments by undercover journalists posing as lobbyists⁴⁰. Zalba Bidegain tabled 27 technical amendments to the report on the future of EU member state BITs – according to Parliamentary sources, without following the issue or participating in the later negotiations for compromise amendments. Fifteen out of his 27 proposals were identical to those submitted by another Spanish MEP, Emilio Menéndez del Valle from the Socialists and Democrats, who it is claimed, also did not follow the discussions. Asked about the identical wording, Zalba Bidegain replied that this was “the result of the contacts I have had with the Spanish Permanent Representation”. Menéndez del Valle's office couldn't give any explanation. The Spanish representation did not respond when asked whether they had provided both MEPs with the blueprints.

A number of other MEPs tabled identical or very similar amendments, including: Robert Sturdy (European Conservatives and Reformists, UK) and Pawel Zalewski (EPP, Poland) who was the EPP's lead person on the investment discussion. Seventeen of his 27 amendments were identical to Sturdy's or nearly so. Zalewski's office explained that this was entirely normal as both political groups had the same view on the issue. Sturdy's office did not respond.

A scary scenario

Thanks to the compromise agreements negotiated by Kader Arif, many of the EPP's hardline positions were softened or rejected in the final vote in the INTA committee on 15 March. But despite the rapporteur's efforts, the vote in the Parliament's plenary next week will not trigger the much needed u-turn in European international investment policy. Instead, it will give a green light to new privileges for multinational corporations which threaten to squeeze billions out of European taxpayers and challenge governments' ability to act in the best interests of their citizens.

The Commission's proposals for investment provisions in its future free trade agreements with Canada, India and Singapore suggest that this scenario might soon become reality. There is no doubt that investors from these countries will use the deals to challenge European policy measures. The EU's interim draft sustainable impact assessment for the planned trade deal with Canada already predicts that the investment provisions will lead to “monetary damages, and may create some regulatory chill, potentially reverse and/or undermine current public policies, change government requirements already in practice, and make it more difficult for the government to remedy failed privatisations – which would limit policy space”⁴¹. The Commission has also announced that it plans to negotiate investment agreements with China and Russia.

Meanwhile the tough negotiations about the compromise agreements to Carl Schlyter's report are

on-going. The vote is scheduled for the INTA committee meeting in April. Last week, the increasingly frustrated rapporteur told Corporate Europe Observatory that “it looks like I won’t be able to get support for even the slightest reference to other policies in my report. Not even something basic like “investment policies shouldn’t completely destroy other policies”. You could table an amendment saying “investment policy should always over-ride any other policy and no democratic decision should ever take a single cent from an investor and if that happens, the investor should be double compensated for the loss.” That would probably be adopted. Because that is what the position of many MEPs means. It is very scary.”

The interview with Carl Schlyter is available online at:
<http://www.corporateeurope.org/global-europe/blog/pia/2011/03/24/mep-lobbyism-main-reason-bad-policy>

Annex 1: The EPP's corporate attack on the Arif report

What was proposed? ⁴²	By whom and in what amendment? (all EPP if not otherwise indicated)
Make sure that EU member state BITs are not terminated before a new EU agreement is in place and do not question/review them. Intra-EU BITs should not be terminated, but extended to all EU investors.	Daniel Caspary (31), Godelieve Quisthoudt-Rowohl (76, 166)
Take out or water down formulations that EU investment policy should contribute to economic, social and environmental progress.	Daniel Caspary (35) Pawel Zalewski (36) Godelieve Quisthoudt-Rowohl (38)
Include investor-to-state dispute settlement provisions in future EU investment agreements.	Laima Liucija Andrikiene + Christofer Fjellner (73), Godelieve Quisthoudt-Rowohl (94), Pawel Zalewski (97, 150), Daniel Caspary (146)
Delete or water down references to explicit clauses laying down the right to regulate and other remarks about the need to protect the public capacity to regulate.	Daniel Caspary (40), Godelieve Quisthoudt-Rowohl (41), Christofer Fjellner (113), Quisthoudt-Rowohl (114),
Enlarge the scope of future investment agreements: explicitly include the protection of intellectual property rights and volatile portfolio investment (or delete words that explicitly exclude them) and ensure that they receive the same protection standard.	Christofer Fjellner (49), Daniel Caspary (50), Pawel Zalewski (51), Jan Zahradil, European Conservatives and reformists (52), Godelieve Quisthoudt-Rowohl (53)
Make sure that investments are also protected against 'indirect expropriation' (= the notion that expropriation can also be the indirect result of a government action hampering profits). Take out the reference that expropriation clauses should define a fair balance between public and private interests.	Daniel Caspary (91)
Make sure that sensitive sectors such as culture and education are not excluded from the scope of investment agreements or only on a case-by-case basis.	Christofer Fjellner (117), Godelieve Quisthoudt-Rowohl (118), Pawel Zalewski (119), Daniel Caspary (120)
Take out any reference to the OECD guidelines for multinational companies	Micheal Theurer. Liberals (123), Godelieve Quisthoudt-Rowohl (124)
Take out the request that future investment treaties should also include binding social and environmental clauses or make sure that the dispute settlement system does not apply to them.	Christofer Fjellner (133), Godelieve Quisthoudt-Rowohl (134), Pawel Zalewski (135), Daniel Caspary (136)
Delete or water down proposed major changes to the dispute settlement system (more transparency, the obligation to exhaust local remedies...)	Godelieve Quisthoudt-Rowohl (142), Pawel Zalewski (143)
Take out the call on the Commission to find solutions for trade unions and civil society groups to bring actions against investors that do not comply with social and environmental commitments.	Christofer Fjellner (155), Godelieve Quisthoudt-Rowohl (156), Pawel Zalewski (157)

Annex 2: Lobbyists writing amendments?

What the lobbyists wrote ⁴³	What the MEPs proposed
<p>“The Commission should require member states to extend the protection under existing intra-EU BITs to all EU investors.”</p>	<p>“[The European Parliament] calls on the Commission to require Member States to extend the protection under existing INTRA-EU BITs to all EU investors, instead of calling for the termination of them”</p> <p><i>MEP Godelieve Quisthoudt-Rowohl, Germany, EPP, amendment 166 to the report of Kader Arif</i></p>
<p>“[The EU should] concentrate on concluding new treaties with trading partners of the EU that have few or no BITs with member states.”</p>	<p>“[...]defining a European investment policy which meets the expectations of investors and beneficiary states, namely by raising the level of protection and concluding new treaties with trading partners that have few or no BITs with Member States”</p> <p><i>MEP Godelieve Quisthoudt-Rowohl, Germany, EPP, amendment 34 to the report of Kader Arif</i></p>
<p>“Most BITs provide that they remain effective for a period of, say, 15 years after termination. The transitional cover only applies to investments that already exist when the BIT is terminated. All investment made after that time would be left without protection until the EU concluded a BIT to replace it. [...] Until that happens, it is essential that existing BITs remain in place.”</p>	<p>“whereas although a terminated BIT may remain in force for up to 20 years, this transitional phase applies only to existing investment and not to new investment; whereas it is therefore essential not to terminate a BIT before it is replaced by a new EU investment protection agreement”</p> <p><i>MEP Daniel Caspary, Germany, EPP, amendment 31 to the report of Kader Arif</i></p>

Notes

- 1 Bernasconi-Osterwalder, Nathalie (2010): European Parliament Hearing on Foreign Direct Investment, November, http://www.iisd.org/pdf/2010/eu_parliament_hearing_investment.pdf, p.5.
- 2 Presentation of Dr. Nikos Lavranos, senior trade policy advisor from the Dutch Ministry of Economic Affairs: Practice of Dutch BITs, presentation to INTA members, assistants and advisors, 6 October 2010, https://www.iwork.com/document/de/?d=INTA_presentation_6-10-2010.key&a=p198632771&u=n.lavranos@minez.nl&p=7E195CCE32C94F39B313.
- 3 See endnote 1.
- 4 See, for example: Austrian Chamber of Labour (AK) (2010): AK Position Paper. Investment Package of the European Commission: towards a comprehensive European International Investment policy; transitional arrangements for bilateral investment agreements; Reclaiming public interest in Europe's international investment policy; Civil society statement on the future of Europe's international investment policy, July 2010, http://www.s2bnetwork.org/fileadmin/dateien/downloads/EN_-_Final_BITS_Statement_with_signatures_july_2010.pdf; Public statement on the international investment regime, 31 August 2010, http://www.osgoode.yorku.ca/public_statement/.
- 5 Bernasconi, Nathalie (2009): Background Paper on Vattenfall v. Germany Arbitration, IISD, http://www.iisd.org/pdf/2009/background_vattenfall_vs_germany.pdf.
- 6 Hall, David (2010): Challenges to Slovakia and Poland health policy decisions: use of investment treaties to claim compensation for reversal of privation/liberalisation policies, January, <http://www.psir.org/reports/2010-02-H-tradelaw.doc>.
- 7 For an overview of different steps in the direction of an alternative investment regime, see: <http://justinvestment.org/2010/09/leading-academics-voice-concerns-over-investment-treaties/>.
- 8 For more information on the lobbying preceding the Commission proposal and the text itself, see: Corporate Europe Observatory (2010): The Battle to Protect Corporate Investment Rights. Commission tempers its new powers in response to business lobby, July, <http://www.corporateeurope.org/system/files/files/article/Battle+to+Protect+Corporate+Investment+Rights.pdf>.
- 9 Interview with Carl Schlyter: MEP says lobbyism is the main reason for bad policies in the EU, 24 March, <http://www.corporateeurope.org/global-europe/blog/pia/2011/03/24/mep-lobbyism-main-reason-bad-policy>.
- 10 Ibid.
- 11 Commission report about a meeting between the European Services Forum (ESF) and the Trade Policy Committee Services and Investment, held on 16th November 2010, dated 23 November 2010, TRADE B1-MB/am(2010). Obtained through access to documents requested under the information disclosure regulation. On file with CEO.
- 12 On 13 January 2011, BusinessEurope participated in a seminar organised by the Polish MEP Pawel Zalewski (EPP). On 26 January, the lobby group organised a breakfast meeting together with German MEP Michael Theurer (Liberals).
- 13 European Parliament (2010): Draft report on the 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, 2010/0197(COD), 18 November; European Parliament (2010): Draft report on the future European international investment policy, 20 December, 2010/2203(INI).
- 14 Leaked report of the meeting of the Council's Trade Policy Committee on services and investment on 10 December 2010; UK government briefing for MEPs of the Inta Committee: Establishing transitional arrangements for bilateral investment agreements between Member States and Third countries, sent on 30 November 2010. Both are on file with CEO.
- 15 See endnote 12. According to the INTA newsletter, BusinessEurope also meet the chair of the INTA committee on 8 January 2011. The German industry federation BDI met him on 17 January.
- 16 Email report about BusinessEurope breakfast meeting on 26 January from DG Trade's Pauline Weinzierl to colleagues, dated 26 January 2011. Obtained through access to documents requested under the information disclosure regulation. On file with CEO.
- 17 http://www.hoganlovells.com/custom/Invite/110222_Manufacturers/invite2.html
- 18 Endnote 3, p. 3.
- 19 Interview with Nathalie Bernasconi-Osterwalder, senior lawyer at the International Institute on Sustainable Development (IISD), 17 March 2010.
- 20 European Commission (2009): Mission Report. 50 years of Bilateral Investment Treaties Conference – Frankfurt 1-3 December 2009. Obtained through access to documents requested under the information disclosure regulation. On file with CEO.
- 21 Email from Sidley's Daniel Price to Jean-François Brakeland, head of the services and investment unit in the Commission's trade department, dated 5 January 2010. Obtained through access to documents requested under the information disclosure regulation. On file with CEO.
- 22 Background material for the foreign investment roundtable organised by Hogan Lovells in Frankfurt on 7 June 2010

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- and the internal Commission report on the EU foreign direct investment roundtable organised by Hogan Lovells in Brussels on 7 December 2010, dated 21 December 2010, TRADE F.2 CB/MAL/ba. Obtained through access to documents requested under the information disclosure regulation. On file with CEO.
- 23 Kleinheisterkamp, Jan (2010): The Dawn of a New BIT Generation? - The New European Investment Policy, 23 December, <http://kluwerarbitrationblog.com/blog/2010/12/23/the-dawn-of-a-new-bit-generation-%E2%80%93-the-new-european-investment-policy/>.
- 24 Email from Edward Geuns to members of the INTA Committee, dated 26 January 2011, including van Geuns, Edward/ Jansen, Nani (2011): Protecting investments post-Lisbon Treaty, in: Global Arbitration Review 6:1, 1-2. Both are on file with CEO.
- 25 BusinessEurope (2010): Speaking points on EU investment policy, 8 November, <http://www.europarl.europa.eu/document/activities/cont/201011/20101118ATT96256/20101118ATT96256EN.pdf>.
- 26 At a meeting with the EU ambassador in Delhi, Daniele Smadja, in July 2010, Rajan Bharti Mittal, president of the Federation of Indian Chambers and Industry (FICCI), for example, said about Indian companies: “They are hungry for growth and aim to establish a strong global presence. Investing through acquisitions in the EU would give them a strong push to achieve their global ambitions in the quickest possible time.”, <http://www.thehindubusinessline.in/2010/07/24/stories/2010072451270700.htm>
- 27 See endnote 1.
- 28 For an overview of the literature, see: UNCTAD (2009): The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries, New York/Geneva.
- 29 European Commission (2010): Report Mission to Beijing, 9-12 March 2010, dated 12 March, Trade B1-MK/dc (2010) 2976. According to the report, the mission included a seminar on investment where “both parties agreed in principle that there is no clear data showing that BIT’s do improve investment flows, however they provide industry with the necessary legal certainty.” Obtained through access to documents requested under the information disclosure regulation. On file with CEO.
- 30 For a review of the literature, see Bonnitcha, Jonathan/Aisbett, Emma (2010): Submission to the Productivity Commission’s Review of Bilateral and Regional Trade Agreements, April, http://www.pc.gov.au/_data/assets/pdf_file/0004/96817/sub045.pdf, p.4.
- 31 See endnote 19.
- 32 Productivity Commission (2010): Bilateral and Regional Trade Agreements, Research Report, Canberra, p. 274.
- 33 Public statement on the international investment regime, 31 August 2010, http://www.osgoode.yorku.ca/public_statement/.
- 34 Comments from professor Gus van Harten from York university, Canada, on the interim report for the Sustainability Impact Assessment (SIA) of the Comprehensive Trade and Economic Agreement (CETA) between the EU and Canada, 4 March 2011. On file with CEO.
- 35 <http://www.publiceye.ch/en/vote/philip-morris/>
- 36 See endnote 34.
- 37 See endnote 4, p.269.
- 38 European Parliament Committee on International Trade (2011): Amendments 1-167. Draft report Kader Arif, 2010/2203(INI), 9 February, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-458.494+01+DOC+WORD+V0//EN&language=EN>.
- 39 European Parliament Committee on International Trade (2011): Amendments 30-213. Draft report Carl Schlyter 2010/0197(COD), 21 January, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-454.644+01+DOC+WORD+V0//EN&language=EN>.
- 40 Sunday Times (2010): Insight. Fourth MEP taped in ‘cash-for-laws’ scandal, 27 March.
- 41 A trade SIA relating to the Negotiation of a Comprehensive Economic and trade Agreement (CETA) between the EU and Canada, Trade 10/B3/B06. Final interim report, December 2010, p. 207.
- 42 These amendments are 100% in line with positions of industry lobby groups and law firms in position papers, articles, letters and oral contributions mentioned in endnotes 16, 22, 24 and 25. More sources include: Letter from ESF to Karel de Gucht and Commission staff: European Services Industry views on the EU new investment policy, dated 25 June 2010; BDI (2010): Discussion Paper. Bilateral investment treaties. German industry’s position on the transfer of competencies to the European Union, 9 July, document no. D0352; internal Commission reports about meetings with BusinessEurope (on 28 May 2010, report dated 1 June, Trade B1/MB/am D (2010) 5589 and on 25 November 2010, report dated 25 November, trade.dga1.b.1(2010)956526) and the Dutch industry association VNO-NCW (on 27 May).
- 43 The examples are taken from the article mentioned in endnote 24.