

Reclaiming public interest in Europe's international investment policy

Civil society statement on the future of Europe's international investment policy

July 2010

Putting on hold and rethinking existing agreements

Since the Lisbon Treaty entered into force on 1st of December 2009, the competence to negotiate international agreements concerning Foreign Direct Investments (FDI) has shifted from individual member states to the EU.

Trade justice campaigners working together in the “Seattle to Brussels Network”¹ believe that EU member states' current bilateral investment treaties (BITs) are inappropriate, unbalanced and outdated and should not serve as blueprints for the EU's future investment treaty model.

They therefore advocate that:

- **all Member States' BIT negotiations should be put on hold**, while the new and improved EU investment policy framework is being defined
- a **sunset clause** is set on all existing Member States' BITs, under which they would expire at a certain date unless they were reviewed to achieve a greater balance between the protection of public and private interests and of economic, social, environmental and developmental interests;
- the European Commission undertakes a **thorough assessment** of the Member States BITs and the functioning of international investor-to-state arbitration regarding their impact on the policy space of governments to further sustainable development, gender justice and social equity and to implement their obligations under international conventions and treaties on human, women's and labour rights, the environment and climate change
- **broad public consultations** are held before any decision on an EU investment policy is taken.

Europe needs to critically examine the developments over the past decade in the area of international investment law, policy, practices and experiences, and ensure that it does not repeat the mistakes of EU member states when crafting its investment treaties and investment chapters in future trade agreements. Now is the time to think out of the box and develop an investment treaty model that truly promotes long-term socially and environmentally sustainable investment and transforms Europe's complex web of bilateral investment treaties into a more transparent, predictable and balanced system.

A major opportunity to foster policy coherence

Since the Lisbon Treaty entered into force, the European Commission is preparing a new European policy regarding Foreign Direct Investments (FDI). So far, the European Commission seems to be prioritising consistency with existing EU law and "*legal certainty and maximum protection for EU Investors*"². It does not seem concerned about overcoming the lack of transparency in investment arbitration or interested in

¹ The Seattle to Brussels (S2B) Network (www.s2bnetwork.org) is a pan-European network of more than 70 organisations from 16 countries campaigning to promote a sustainable, socially and democratically accountable system of trade. It includes development, environment, human rights, women and farmers organisations, trade unions, social movements as well as research institutes. The S2B Network is part of the global coalition "Our World is Not for Sale" (www.ourworldisnotforsale.org).

² Quoted from the public part of the highly censored EU document [5667/10 WTO 25] : *Outcome of proceedings of the Trade Policy Committee (Full Members) meeting on 22 January 2010*, available at: <http://register.consilium.europa.eu/pdf/en/10/st05/st05667.en10.pdf>

assessing or preventing possible negative development, social, environmental and human rights impacts resulting from existing from EU Member States' existing BITs.

S2B members believe that rather than moving to an EU investment treaty approach that simply mirrors member state models, the EU should critically assess the international investment framework, fix its deficiencies and develop a foreign investment policy that balances investors' rights with investors' duties and fosters positive investor behaviour by promoting long-term socially and environmentally sustainable investment as well as the objectives of the European Union with regard to development, social, environmental, human and women's rights.

This new approach should comply with new provisions on policy coherence within the overall EU external policy under the Lisbon Treaty, Art. 208 TFEU, which defines the achievement of the MDGs and poverty reduction as over-arching foreign policy goals for the whole Union. Similarly, as recently highlighted by the UN Special Rapporteur on business and human rights, investment treaties should balance investor rights on the one hand and the host states' policy space on the other hand, in order to allow protection and promotion of human rights – another horizontal objective for the European external policy.

The EU has also subscribed the ILO's Decent Work agenda. Investment treaties should contribute to the creation of decent work and the effective implementation of core labour standards and other basic decent work components.

The G20 has recognised the need to tackle global imbalances in the world economy. Investment can play a crucial role in doing this. Portfolio investment in particular has exacerbated volatility and speculation in the financial markets and the related emergence of a shadow banking system speculation, while allowing quick withdrawal of capital that contributed to the financial and economic crisis. Given that the Lisbon Treaty adds foreign direct investment to the EU competences (which has not previously included portfolio investment, for instance), but does not provide a clear definition of FDI, a careful approach needs to be followed in order to link investments to the productive economy and to allow for these impacts to be monitored.

Why existing BITs undermine development and public interest policies

We believe that several elements of the approach currently applied by EU Member States require rethinking.

EU Member State investment treaties typically provide broad protection for investors and to do so impose far-reaching obligations on the state receiving the investment (the host state). This potentially undermines countries' long-term economic and social development, as well as the rights of local communities. This focus on investment protection which dominates the current investment treaty model must be questioned and reviewed. The literature about the impact of foreign investment on (sustainable) development shows a mixed picture and points to the need for more than an overall investment protection policy to benefit from foreign investment. Why should investment treaties only provide rights to investors and impose obligations on host states? Why should investment treaties only be about investment protection and not also about the promotion of socially and environmentally sustainable investment? We believe it is time to ensure that home states and investors are also held responsible through investment treaties. They need to foster positive investor behaviour and long-term socially and environmentally sustainable investment in the host state.

Investment definitions in current BITs often include portfolio investment, which allows European private financial firms to have their purely financial operations, investments and speculation in host countries covered by protection clauses. BITs also grant the right to the free movement of capital, even though this could lead to

speculation, tax-evasion and tax avoidance, favouring capital flight from developing countries instead of supporting investments into the productive economy. This focus on the free movement of capital is also a threat to local and international financial stability and should be strictly constrained. The European Court of Justice has already condemned some of the provisions in investment treaties, notably those relating to the free transfer of capital, as incompatible with European law. Therefore a limited and clear definition of FDI should be included in the new EU international investment policy.

The impact of certain provisions, such as most-favoured nation treatment (MFN), must be reassessed in the light of the decisions made by international arbitration tribunals in recent years, which have allowed investors to “import” commitments that host states made in other agreements. These developments limit policy space in host countries – including in Europe – and do not provide host states with sufficient benefits to compensate for their loss of regulatory freedom.

Another cause of concern is the unspecified language used in the agreements that is vulnerable to far-reaching and uncertain interpretation, specifically with regard to expropriation provisions and “catch all” clauses that guarantee the “fair and equitable” treatment of foreign investors. They have allowed investors to challenge a wide range of regulatory measures, including measures with a clear public purpose.

The duration of bilateral investment treaties is also problematic. While they often have to be reviewed after 5 or 10 years, and in some cases must be ratified again, protection provisions remain in place for decades after the expiry of investment treaties for investments that began when the treaty was still in force. This represents a barrier to renegotiating more balanced agreements.

One of the most important and distinctive characteristic of the current BITs, however, is the built-in investor-state dispute settlement process. This allows investors to challenge host state actions and measures directly through international tribunals, without first having to use administrative and judicial channels in the host state. States and citizens on the other hand cannot bring foreign investors to those international tribunals. Moreover, the treaties offer these protections and rights to foreign investors irrespective of whether the investors actually contribute in any meaningful or positive way to the host state’s development. This arbitration practice lacks transparency which is in violation of the EU’s access to information policies. There is also a reluctance to open procedures to third party testimonies and submissions and a lack of adequate independence among the arbitrators who tend to cover different roles in different cases. This has contributed to excessively expansive and often contradictory interpretations of investor’s rights. Therefore we believe that any future European investments agreements must not contain international investor-state dispute settlement.

Signatures

Africa Europe Faith and Justice Network
FIAN International
Friends of the Earth Europe
Women in Development Europe
The Seattle to Brussels Network
Transnational Institute
AITEC, France
ATTAC Austria
ATTAC France
ATTAC Hungary
ATTAC, Spain
BothEnds, The Netherlands
Centre for Encounter and Active Non-Violence, Austria
Centro Nuovo Modello di Sviluppo, Italy
Christliche Initiative Romero, Germany
CINI (Coordinamento Italiano Network Internazionali), Italy

Coalition of the Flemish North-South Movement-11.11.11, Belgium
Comhlamh, Ireland
Coopi Piemonte, Italy
Corporate Europe Observatory, The Netherlands
CRBM, Italy
Ecologistas en Accion, Spain
FAIR, Italy
FIAN, Germany
Fondazione Culturale Responsabilità Etica, Italy
Informationsstelle Peru e.V., Germany
INKOTA, Germany
Kampagne Bergwerk Peru, Germany
MAIS, Italy
Oxfam International
Philippinenbüro, Germany
PowerShift, Germany
SOMO, The Netherlands
SÜDWIND e.V. - Institut für Ökonomie und Ökumene, Germany
Terra Nuova, Italy
Terre des hommes group Schäbisch Gmünd, Germany
UmweltRundschau, Germany
Verein zur Hilfe Umweltbedigt Erkrankter, Germany
War on Want, UK
World Economy, Ecology & Development (WEED), Germany