

# 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 1<sup>st</sup> of December 2009, the competence to negotiate international agreements concerning Foreign Direct Investments (FDI) has shifted from individual member states to the EU.

The undersigned organisations believe that EU member states' current bilateral investment treaties (BITs) are inappropriate, unbalanced and outdated and should not serve as blueprints for the EU's future investment treaty model.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*"<sup>1</sup>. It does not seem concerned about overcoming the lack of transparency in investment arbitration or interested in assessing or preventing possible negative development, social, environmental and human rights impacts resulting from existing from EU Member States' existing BITs.

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<sup>1</sup> 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>

The undersigned civil society organisations 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. Liberalisation and protection of portfolio investment in particular has exacerbated volatility in the financial markets, as well as related speculation and shadow banking, thus contributing to the financial 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.

Signed :

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