Investment, Development and Labour Rights
Investment Rules

WORKING FOR WORKERS?

I. INTRODUCTION TO INVESTMENT AGREEMENTS

International investment is an important driver of the global economy. In 2013, foreign direct investment flows rose to US$ 1.45 trillion and are anticipated to reach US$ 1.6 trillion in 2014. Much of this investment is made by multinational enterprises, with roughly 100,000 such enterprises controlling over 900,000 foreign affiliates worldwide. Some of this investment is regulated under the terms of international investment agreements, which reached a total of 3,236 by the end of 2013 (roughly 1,400 by EU member states). Forty four such agreements were negotiated in 2013 alone.

There is no doubt that FDI can play a positive role by creating decent jobs, improving productivity, investing in skills and technology transfer, supporting economic diversification and the development of local firms and aiding with a just transition to a green economy. However, FDI can also undermine decent work, sustainability, distribution and general well-being. ***Much depends on the rules of the game and how they are enforced.*** Trade unionists are rightly concerned that the current rules are rigged and that they will be replicated in future agreements. As the EU engages in multiple and significant trade agreements and investment treaties, it threatens to further tilt the legal landscape throughout Europe towards investors at the expense of member states and their rights and the welfare of their citizens.

Most importantly, investor protections under investment treaties or the investment chapters of trade agreements have been used in the past to threaten the host states' right to regulate. Further, these agreements often contain Investor-to-State Dispute Settlement (ISDS) clauses, a specific type of dispute settlement in investment treaties which allows the investor, i.e. the foreign corporation, to bypass national courts and sue a government in an international arbitral tribunal. Some investors have claimed outrageous sums of money, including not only alleged actual losses but also loss of anticipated future profits. These tribunals are often populated by the same investment lawyers who also represent clients before such tribunals and thus have an incentive to create a generous legal environment for investors. These decisions are final and binding.

In 2013, we saw the second largest number of new investment cases filed – 56. This brings the total number of known cases up to 568! The majority of cases filed by the end of 2013 were brought by developed country investors (85%). In all, 53% of cases are from EU member states, with investors from the Netherlands, the UK and Germany filing the most (61, 43 and 39 cases respectively). Of concern, 42% of cases filed in 2013 were filed against EU member states and more than half of those claims were against Spain and the Czech Republic over regulations in the renewable energy sector.

Trade unions feel strongly that countries must retain the ability to meet important public policy objectives, including labour rights, environmental protection, the provision of public goods (health, education and social security) as well as the development of coherent industrial policies. Investment provisions can do just the opposite, allowing foreign investors (or in some cases subsidiaries of domestic firms) to challenge existing or even proposed regulations as a violation of their rights.

Fortunately, governments are beginning to rethink investment agreements and ISDS in particular. Notably, some have even terminated agreements over serious concerns about their impact on economic governance and social welfare. South Africa and Indonesia both terminated investment agreements in 2013, and others are certain to follow. Other governments are looking to ensure that these agreements are more balanced, and include provisions on sustainable development. Still others are taking a hard look at reforming ISDS.

In 2013, the EU received over 150,000 comments from the public concerning its investment policy, as the EU embarks on the Transatlantic Trade and Investment Partnership (TTIP). It is unclear as yet whether the European Commission will heed the call of the public and the European Parliament (see European Parliament Resolution of 6 April 2011 on the Future European International Investment Policy) to substantially reform its approach to investment, though the outcome of recent negotiations do not inspire confidence. The recently negotiated trade agreement with Canada, the Comprehensive Trade and Economic Agreement (CETA), includes an investment chapter lacking the reforms to investment rules that trade unions have demanded. And, the EU has yet to explain convincingly why an ISDS mechanism with Canada is necessary at all.

There is a better way. The ETUC will reject any investment agreement which puts the profits of corporations over the rights of people. The EU must change course now and overhaul its approach to investment.

II. WHAT ARE OUR CONCERNS?

Our concerns are not theoretical. Investors have recently challenged governments in international tribunals in numerous cases for enacting or carrying out public interest laws and regulations. For example, the French multinational Veolia is suing the Egyptian government over, among other things, recent increases in the minimum wage in Alexandria. In June 2012, Vattenfall filed a case against the German government when it decided to restrict the use of nuclear power after the Fukushima disaster in Japan. Investors have even challenged governments for failing to provide adequate protection to their investments when workers went on strike. In this way, multinational companies are using investor protection rules and ISDS as a means of achieving corporate aims, increasing the cost to the taxpayer of defending public policy and rules. Even when unsuccessful, multinationals impose a significant cost on taxpayers to defend the cases, and sometimes discourage regulatory action for fear of having to defend it in costly litigation.

Below are just some of our concerns:

The Rules

Definitions: The definitions of "investor" and "investment" can be very broad and can include questionable forms of investment including risky financial instruments such as futures, options and derivatives, as well as sovereign debt. As we see with Argentina, efforts to restructure its debt have been undermined by hold-out investors' claims.

National Treatment: In some cases, agreements include expansive liberalisation commitments by providing for pre-establishment rights, which limit the state's discretion to regulate the entry of foreign investors. Further, the non-discrimination principle can be interpreted by tribunals as prohibiting regulatory actions that result in "de facto" discrimination, even when there is no intentional discrimination.

Most Favoured Nation: Recently, some arbitrators have ruled that MFN clauses may allow investors to invoke greater investor protections found in third-party agreements – allowing the agreement between the home and host states of the investor to be (selectively) circumvented.

Expropriation: Broad definitions of expropriation, and in particular indirect expropriation, have allowed investors to challenge a range of host state actions taken in the public interest on the dubious grounds that these actions constitute forms of "indirect expropriation".

Fair and Equitable Treatment: Arbitrators have given wide-ranging interpretations of fair and equitable treatment, imposing on states any number of unforeseen limitations on state regulatory power. For example, an investor used the Fair and Equitable Treatment Clause to challenge South Africa's Black Economic Empowerment programme, a set of policies meant to help historically disadvantaged South Africans through affirmative action in employment, preferential access to procurement contracts and divestment requirements.

Full protection and security: The scope of this obligation is also not clear; however, international arbitrators have found that it requires that states provide at least a baseline of police protection for foreign-owned projects. Some arbitrators have also held that this includes not only the physical protection of foreign-owned investments, but also security from other forms of harassment which pose no physical threat to assets. Indeed, FPS has been used by investors to sue government when workers have gone on strike against a company or in cases of mass demonstrations.

Umbrella Clauses: Investment treaties should not contain clauses which import investors' contractual rights into the treaties, giving them far stronger protection. A common issue arising in this context is a contractual stabilisation clause, which attempts to insulate investors from changes in law or governmental decisions taken after the effective date of the agreement.

Capital Controls: investment treaties usually allow investors to freely transfer funds abroad. However, states may have legitimate reasons to limit or temporarily suspend such transfers, especially in the case of balance of payment problems.

Enforcement: The ISDS Mechanism

Foreign corporations avoid domestic courts: Despite the EU's claim that it favours domestic courts, investors are free to choose whether to sue the host state in local courts or to move directly to international arbitration under ISDS. Traditionally, parties were required to exhaust local remedies as a precondition for bringing a claim to an international tribunal, unless it would be futile. This is also a central principle of access to human rights courts, such as the European Court of Human Rights. Direct access to international arbitration gives foreign corporations an advantage over domestic corporations, which are unable to invoke ISDS even if affected by the same measure.

Scope of investor-state provisions: Investors can and do challenge a broad range of legitimate regulatory activity through ISDS, which is meant to promote public interest objectives (including public health, the environment and labour). Perhaps the best known efforts by investors to challenge public interest regulation are the claims challenging plain packaging for cigarettes, which some countries have adopted as a public health measure to reduce cigarette smoking.

Conflicts of Interest: Investment tribunals are constituted for each individual case and are usually composed of highly specialised commercial lawyers from international law firms. They are not necessarily therefore impartial judges, but lawyers with other clients who have an interest in pro-investor interpretations of agreements. While there are guidelines to avoid conflicts of interest in international arbitration, these were drafted by international arbitrators and are self-policed.

No Appeals: There is no appellate mechanism to correct errors of law, forcing states to comply with legally dubious decisions handed down by arbitration panels. Some arbitration awards are wildly inconsistent with international law.

III. WHAT DO TRADE UNIONS WANT?

The current TTIP negotiations between the EU and the United States, as well as CETA, have put ISDS under the spotlight. While negotiations on the TTIP are still at an early stage, we know that negotiators on both sides have stated that they wish to include an ISDS mechanism in the deal as part of the broader investment chapter. The ETUC has been campaigning against the dangers of certain investment rules and the ISDS mechanism as a threat to democracy and workers' rights since 2009 as part of lobbying for fair investment rules following the Lisbon Agreement - which made investment a European competence.

Here are some ideas:

1. European institutions have endorsed the idea that countries have a right to regulate and that investment treaties should not restrict the ability of member states to take measures necessary to pursue legitimate public policy objectives. Investment rules must make clear that any regulatory actions taken to protect the public welfare and which are not intentionally discriminatory do not constitute a violation of the agreement. To the contrary, an investment agreement should promote the public welfare.

2. Agreements should include binding commitments to ratify and implement fundamental labour rights. Governments must also commit not to eliminate or weaken labour standards in order to attract foreign investment. Workers should also be able to file complaints against a government if it fails to respect these commitments, with the possibility for sanctions if they fail to comply with an adverse ruling.

3. Before entering into such agreements, governments must commit to undertake human rights impact assessments, in consultation with workers, and take action based on the findings.

4. There are alternatives to ISDS. The ETUC Resolution on EU Investment Policy (link below) urges investors to use domestic courts. If there remains a claim that an investor's rights were still not protected, an alternative dispute mechanism or a state-to-state arbitration could be used to resolve the dispute. Companies can also take out insurance if they wish to have additional protection when they make a foreign investment, as corporations have done for decades through institutions such as the Multilateral Investment Guarantee Agency (MIGA).

5. Investment agreements must ensure at the very least that investors respect the laws of the host state when establishing and operating an investment. When they fail to do so, they should be denied the protections afforded by the treaty. They should also be held responsible for violations in their supply chains.

6. Even if the EU continues to support ISDS, the EU must take measures to rein in abuses. This could include requiring investors to fully use the national courts first before filing a claim at the international level. Further, the functioning and outcomes of these tribunals must be far more transparent. To ensure that arbitrators make high quality and consistent decisions, there should also be a means to appeal. Importantly, we need to eliminate the conflicts of interest which are common today, given that many investment judges are also representing clients and thus are likely to endorse pro-investor outcomes that would benefit them in the future. Inequality lies at the very foundation of ISDS as it privileges foreign investors over any other economic actors - domestic investors or interest groups such as consumers or workers – by giving them the right to access special courts for pursuing claims of expropriation.

IV. RESOURCES FOR TRADE UNIONS ON INVESTMENT FLOWS, INTERNATIONAL INVESTMENT AGREEMENTS AND ISDS

For a fuller explanation of these and other issues, please see: ETUC Resolution on EU Investment Policy, 19 March 2013, online at http://www.etuc.org/documents/etuc-resolution-eu-investment-policy#.UyMJW_IdX0Q

http://www.business-humanrights.org/SpecialRepPortal/Home/Materialsbytopic/Investment

http://ces.iisc.ernet.in/envis/sdev/investment_model_int_handbook.pdf

http://www.iisd.org/pdf/2011/investment_treaties_why_they_matter_sd.pdf

http://www.ips-dc.org/reports/070430-challengingcorporateinvestorrule.pdf

http://justinvestment.org/2010/08/investment-rules-in-trade-agreements/

http://publications.gc.ca/collections/collection_2012/dd-rd/E84-36-2009-eng.pdf

http://unctad.org/en/publicationslibrary/wir2013_en.pdf

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